Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MGM GRAND HOTEL, LLC,

Petitioner,

v.

MEDINA RENE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 prohibits harassment based on sexual orientation.

2. Whether Title VII harassment cases are cognizable without proof that the harassment occurred "because of . . . sex."

3. Whether a sexual-orientation discrimination case becomes cognizable under Title VII if restyled as a case involving "gender stereotyping."

RULE 29.6 STATEMENT

Petitioner MGM Grand Hotel, LLC (formerly known as MGM Grand Hotel, Inc.), is a wholly owned subsidiary of MGM MIRAGE. MGM MIRAGE is a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

MGM Grand respectfully petitions this Court for a writ of *certiorari* to review a judgment of United States Court of Appeals for the Ninth Circuit, sitting *en banc*.

OPINIONS BELOW

The decision of the *en banc* United States Court of Appeals for the Ninth Circuit, reversing summary judgment for MGM Grand, is reported as *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), and is reproduced in the Appendix beginning at page 1a. The *en banc* decision vacated an earlier Ninth Circuit panel decision that would have affirmed the summary judgment. That panel decision is reported at 243 F.3d 1206 (9th Cir. 2001), and is reproduced in the Appendix beginning at page 36a. The decision of the United States District Court for the District of Nevada, granting summary judgment, is not reported. It is reproduced in the Appendix beginning at page 50a.

STATEMENT OF JURISDICTION

The judgment and opinions of the Ninth Circuit *en banc* were filed September 24, 2002.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e *et seq*. The relevant provisions of Title VII are reproduced in the Appendix at page 52a.

STATEMENT OF THE CASE

1. Respondent Medina Rene is an openly gay man. Between 1993 and 1996, Rene worked as a butler at the MGM Grand Hotel in Las Vegas. He was assigned to the hotel floor set aside for wealthy and high-profile guests, many of whom worked in the entertainment industry. In June 1996, MGM Grand terminated Rene's employment. It did so because, in its view, Rene (an aspiring lyricist) was neglecting his job and pestering MGM Grand's clientele with his songwriting ideas.

2. Rene filed an administrative charge with the Equal Employment Opportunity Commission alleging that he was harassed by his male co-workers and eventually terminated. The EEOC dismissed the charge, noting that "federal law does not cover sexual orientation as a basis" for a claim of discrimination.

3. In May 1997, Rene sued in the U.S. District Court for the District of Nevada, alleging Title VII violations.[1] In his deposition, Rene confirmed his theory of the case:

1. Nevada state law at the time did not prohibit sexual orientation discrimination or harassment. Now it does, Nev. Rev. Stat. § 613.330 *et seq*., but that statute (enacted in 1999) would not apply retroactively to Rene's employment, which ended in 1996. Rene did not allege any state-law tort claims, such as battery. Thus, this case presents only a Title VII claim.

that he (and a gay co-worker, Carlos Trujillo) had been harassed, and that Rene had been terminated, because they are gay.[2] Rene alleged despicable conduct by his

2. Rene spelled out his sexual orientation theory clearly in his deposition testimony (quoted in the Appendix at 33a-34a):

> Q: Do you think [the co-worker] did it to you and Carlos [Trujillo] because you were gay?
>
> A: Yes.
>
> * * * *
>
> Q: It was just because you are gay?
>
> A: Right.
>
> * * * *
>
> Q: And that again was directed at you and Carlos —
>
> A: Right
>
> Q: — because you were gay?
>
> A: Right.
>
> * * * *
>
> Q: They were teasing you because you and Carlos are gay?
>
> A: Correct.
>
> * * * *
>
> Q: Did any of the other guys ever get teased about the relationships they were in that you recall?
>
> A: No. . . .
>
> Q: And they did this specifically because you were gay?
>
> A: Yes. To them it was a joke.

nonsupervisory co-workers, and MGM Grand for purposes of summary judgment necessarily assumed those factual allegations to be true. The Ninth Circuit plurality summarized the allegations as follows:

> The harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex. On "more times than [Rene said he] could possibly count," the harassment involved offensive physical conduct of a sexual nature. Rene gave deposition testimony that he was caressed and hugged . . . . On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. *When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay.*

Pet. App. 2a-3a (emphasis added).

4. MGM Grand moved for summary judgment. It did not condone or defend (and does not here condone or defend) the alleged conduct of the nonsupervisory co-workers. Rather, MGM Grand contended that Rene's allegations did not state a Title VII claim because Title VII does not prohibit discrimination or harassment based on sexual orientation. The district court agreed, granting summary judgment because "Title VII's prohibition of 'sex' discrimination . . . on the basis of gender . . . is not extended to include discrimination based on sexual preference." Pet. App. 50a.

5. Rene appealed to the Ninth Circuit. He abandoned his discriminatory-termination claim and appealed only the harassment claim. A Ninth Circuit panel originally affirmed the summary judgment. The majority (Hug, J., with whom McKeown, J., joined) stated:

> Like the district court, we conclude that Rene has failed to raise a triable issue of fact with regard to whether the harassment he faced was motivated by his gender, and we therefore conclude that summary judgment was proper . . . .
>
> . . . Rene did nothing to show the district court that the harassment was based on his gender. Instead, he stated quite plainly that the question presented was whether the conduct he alleged "is prohibited by Title VII *even though it was directed at [him] because of his sexual orientation.*"
>
> The evidence that Rene presented would . . . not . . . permit a reasonable factfinder to conclude that he was harassed because of his gender. Therefore, his Title VII claim must fail.

Pet. App. 44a-46a (emphasis added).[3]

6. The Ninth Circuit *sua sponte* ordered rehearing *en banc*. The *en banc* court vacated the panel's decision and reversed the summary judgment. Judge William Fletcher

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3. Judge Dorothy Nelson dissented, in an opinion reproduced in the Appendix beginning at page 46a.

wrote for a five-judge plurality.[4] The plurality held that Title VII provides a remedy where the victim was subjected to "severe or pervasive unwelcome physical conduct of a sexual nature." Pet. App. 2a. The plurality held that gender is not the issue; the nature of the conduct is. The plurality asserted that this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), established "that offensive sexual touching in a same-sex workforce is actionable discrimination under Title VII." Pet. App. 10a. Because Rene alleged touching of "body parts clearly linked to his sexuality," Title VII provided a remedy without any need to show a gender-based motivation by the perpetrator. *Id.* at 7a. The plurality relied heavily on *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).[5] Citing *Doe*, the Ninth Circuit plurality stated that a Title VII harassment plaintiff no longer need prove "the conduct at issue constituted discrimination . . . because of . . . sex" as long as the conduct at issue was "of a sexual nature." *Id.* at 6a, 10a-11a.

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4. Judges Graber, Trott, Fisher and Thomas joined Judge Fletcher's opinion.

5. *Doe* had been remanded for reconsideration in light of *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). *Doe* then settled, so there is no published Seventh Circuit decision on remand. Several other courts have held that the reasoning of *Doe* did not survive *Oncale*. *E.g.*, *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001) (the relevant portion of *Doe* "was clearly wrong in light of *Oncale*'s requirement that . . . sexual harassment plaintiffs must prove that the harassment was discrimination because of sex"), *cert. denied*, 534 U.S. 1155 (2002); *Jones v. Pacific Rail Servs.*, 2001 WL 127645, at *2 (N.D. Ill. 2001) (*Doe* is not good law after *Oncale*).

Judge Pregerson wrote for himself and two other judges concurring in the judgment.[6] Judge Pregerson's opinion concluded that sexual orientation discrimination becomes actionable under Title VII because it can be styled as a form of "gender stereotyping." *Id.* at 14a. According to Judge Pregerson's opinion, harassment of a gay man occurs "because of . . . sex" — and thus violates Title VII — because the gay plaintiff did not sufficiently comport with the "gender stereotyp[e]" of men. *Id.* at 13a n.2.

Four judges dissented. Judge Hug, writing for himself and three others,[7] emphasized that "Title VII is not an anti-harassment statute; it is an anti-discrimination statute." *Id.* at 25a. Judge Fletcher's plurality opinion could not be reconciled with *Oncale*, the dissenters explained, because the plurality eviscerated the statutory requirement that the adverse employment action occur "because of . . . sex." 42 U.S.C. § 2000e-2. Under the plurality opinion, "conduct of a sexual nature" violates Title VII whether or not the conduct is based on the victim's gender. *Id.* at 2a. That approach, the dissenters argued, is inconsistent with the statute's language and this Court's cases construing it. *Id.* at 20a, *citing Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 66 (1986) (sexual harassment is actionable where a "supervisor 'discriminate[s]' on the basis of [the subordinate's] sex"; a violation exists only if "discrimination based on sex has created a hostile or abusive work environment") (first alteration in original); *Oncale*, 523 U.S. at 80, 81 (same-sex harassment can violate Title VII, but the

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6. Judge Trott (who also had joined Judge Fletcher's plurality opinion) and Judge Berzon joined Judge Pregerson's opinion.

7. Judges Schroeder, Fernandez and Thomas G. Nelson joined Judge Hug's dissenting opinion.

statute "does not prohibit all verbal or physical harassment in the workplace," only "'discrimination . . . because of . . . sex'"; the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination' . . . because of . . . sex."). The plurality misread *Oncale*, the dissent continued, in citing it for the proposition that "offensive sexual touching," without more, was sufficient to prove a violation. "[T]he Supreme Court in *Oncale* did not hold that the harassment alleged by the plaintiff . . . was actionable under Title VII," the dissenters asserted. Pet. App. 23a. Rather, "the Court remanded [*Oncale* to the lower courts] to address the question of whether the harassment was 'because of sex,' that is, whether the harassment was because of Oncale's gender." *Id.* The plurality thus was simply wrong in asserting that "conduct . . . 'sexual in nature' [meets] the statutory requirements of Title VII." *Id.* at 24a. Such conduct does *not* meet the statutory requirements if the conduct was directed at Rene "because he was *homosexual*"; a Title VII violation would exist only with proof that the conduct occurred because he was *male*. *Id.* at 25a (emphasis added).

The dissenters also rejected the opinion of the three concurring judges, which had rested on the "gender stereotyping" theory. First, the dissenters pointed out that Rene had been consistent from the start that he was relying only on a sexual orientation theory. *Id.* at 21a. Second, the "stereotyping" theory applies only in limited circumstances not present here. A "gender stereotyping" claim must rest on the allegations and proof that "the harassment was because [the plaintiff] acted too feminine [or did not comport with some other male stereotype] *on the job*," not because he did not comport with traditional male stereotypes in other respects. *Id.* at 31a (emphasis added).

Thus, this case squarely presents the question: Does Title VII's prohibition of discrimination based on "sex" mean *gender*, as the dissent said *Oncale* requires? Or does "sex" mean "sexuality" (as the plurality stated) or sexual roles, behavior or "stereotypes" (as the concurring judges stated)?

REASONS FOR GRANTING THE PETITION

The factual allegations in this case unquestionably are disturbing. But they do not state a Title VII claim. MGM Grand shares the views expressed by the First Circuit:

> We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute . . . , not to make a moral judgment — and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999). Thus, the question here is not whether the factual allegations in this case *should* give rise to a remedy; in many states a remedy exists, under a state or local fair employment practices law, or as a common law tort such as battery. The question is whether Congress created such a remedy *in Title VII*. The Ninth Circuit's decision conflicts with the statutory text, with this Court's decision in *Oncale*, and with the decisions of every other court of appeals to have considered the issue. This Court should grant *certiorari*.

I. The Ninth Circuit's Decision Departs From The Statutory Text And Conflicts With This Court's Decisions In *Oncale* And *Price Waterhouse*

"Sexual orientation" never has been protected under Title VII. Title VII prohibits discrimination because of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1). Sexual orientation is nowhere mentioned.

Congress has regularly reconsidered the sexual orientation issue, to no effect. In recent years many bills have been introduced to amend Title VII to prohibit sexual orientation discrimination. *See, e.g.*, Employment Nondiscrimination Act of 2001, S. 1284, 107th Cong. (2001); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994). None, however, has been enacted. If a sexual orientation claim like Rene's were cognizable under Title VII as written, the aforementioned legislative efforts to amend Title VII would have been unnecessary. *Cf. Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.6 (1980) (noting the relevance of subsequent legislative activity); *Flood v. Kuhn*, 407 U.S. 258, 281-82 (1972) (citing failed legislative efforts to amend the statute in question).

It is true, of course, that neither Judge Fletcher's plurality opinion nor Judge Pregerson's concurring opinion claims to rewrite Title VII to proscribe harassment based on sexual orientation. But that is exactly what both opinions do in their effect. As for the plurality opinion, it stripped Title VII of

the requirement that actions be proven to be "because of . . . sex," 42 U.S.C. § 2000e-2. The plurality said that where the conduct is "sexual in nature," gender-based motivation becomes irrelevant. In that respect the plurality opinion cannot be squared with this Court's unanimous decision in *Oncale*. The plaintiff in *Oncale* alleged that he had been subjected to harassment, taking the form of gross "sex-related, humiliating actions," while working in an all-male environment on an offshore oil platform. 523 U.S. at 77.[8] The employer had contended that no sexual harassment was possible in an all-male environment, except perhaps where a homosexual boss demanded sexual favors in exchange for job benefits. Before *Oncale*, the courts of appeals were divided on whether same-sex harassment even potentially could be actionable under Title VII. *Oncale* unanimously held that it could be. *Id.* at 81. *Oncale* emphasized, however, that same-sex claims — like any harassment claim, *see Vinson*, 477 U.S. at 64, 66 (sexual harassment is actionable "discriminat[ion] because of the subordinate's sex") — were valid only if the harassment was based on the victim's gender, *i.e.*, if the harassment occurred "because of . . . sex." 523 U.S. at 79 (Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination 'because . . . of . . . sex'"). A sexually charged working environment is not by its terms unlawful, this Court explained. *Id.* at 80. Sexual content, without more, is not enough; a plaintiff must prove that the harassment was the result of a discriminatory animus resulting from his or her gender. *Id.*

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8. Those actions, the lower court had explained, included a supervisor placing his penis on Oncale's neck and arm, and pushing a bar of soap into Oncale's anus. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

Judge Fletcher's plurality opinion here cannot be squared with *Oncale*. His opinion stated "It is enough that the harasser ha[s] engaged in severe or pervasive unwelcome physical conduct *of a sexual nature*." Pet. App. 2a (emphasis added). The plurality opinion thus cited, but ultimately ignored, the teaching of *Oncale* (and indeed the plain language of Title VII). A Title VII lawsuit requires an (i) adverse job action, (ii) taken for a reason that Title VII prohibits. Sexual content (if severe or pervasive) can comprise the adverse job action. But *Oncale* emphasized that it remains the plaintiff's burden to prove that the adverse action occurred for a reason that Title VII prohibits: gender. The plurality ignored this wholly separate element.

As for Judge Pregerson's concurring opinion, it, if anything, went even farther than the plurality in rewriting Title VII to prohibit sexual orientation discrimination. The plurality's reasoning (focusing as it did on conduct "of a sexual nature") applies only to harassment claims, not to disparate treatment claims alleging discriminatory discharge, promotion or other employment decisions. Judge Pregerson's concurrence sweeps more broadly; it will be read to make unlawful *any* disparate treatment based on sexual orientation.

Here is why. Title VII (the concurring judges tell us) prohibits disparate treatment against persons who do not conform to gender stereotypes. Pet. App. 13a-14a. If adverse action is taken — any adverse action, be it harassment, refusal to hire, promotion denial, or discharge — against someone because he does not meet the classic male stereotype, then that is gender discrimination, according to the plurality. *See id.* at 13a n.2. But male homosexuals by definition depart from at least one gender stereotype, that of

being sexually attracted to women. If gender stereotyping claims are cognizable as "sex" claims under Title VII, then Judge Pregerson's opinion logically holds that sexual orientation claims become cognizable if restyled to recite the words "gender-stereotyping" rather than "sexual orientation."

The concurrence cited *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in support of its "stereotyping" theory, but *Price Waterhouse* did not go nearly so far. In that case the plaintiff was denied partnership in an accounting firm. She sued for sex discrimination under Title VII. Price Waterhouse asserted that she was not promoted because of deficient interpersonal skills. She was widely criticized as being "abrasive[]," "brusque[]," "consistently annoying and irritating," "unduly harsh, difficult to work with and impatient with staff." *Id.* at 234-35. After a bench trial the district court found that these all were legitimate criticisms that were not gender-based. The district court also found, however, that her gender had been a negative factor in her partnership candidacy. The district court specifically cited remarks by partners that Hopkins needed "a course at charm school," that she "overcompensated for being a woman," that she used too much profanity, and that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." *Id.* at 235. In a complex set of opinions, this Court set forth a burden-shifting framework for analysis of so-called "mixed-motive" cases, in which employment decisions are made partly for legitimate and partly for illegitimate reasons.

Two aspects of *Price Waterhouse* bear emphasis. First, this Court assumed, rather than decided, that gender

discrimination existed there.[9] It remains an open question whether stereotyping claims are cognizable under Title VII at all. Indeed, a long line of court of appeals cases, from the earliest days of Title VII to the present, *rejected* discrimination claims based on the application of gender-stereotypical grooming and dress standards. For example, in *Tavora v. New York Mercantile Exchange*, 101 F.3d 907, 908 (2d Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), the appellate court held that "requiring short hair on men and not on women does not violate Title VII." This result clearly reflects stereotypical ideas about how men and women should present themselves. And yet *Tavora* and many other cases hold that this sort of gender stereotyping is not actionable.[10]

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9. The grant of *certiorari* was solely "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit . . . [involving] a mixture of legitimate and illegitimate motives." *Id.* at 232 (plurality opinion of Brennan, J.); *see also id.* at 293-94 & n.5 ("at this late stage we are constrained to accept" this particular plaintiff's proof of liability, but it is "important to stress that Title VII creates no independent cause of action for sex stereotyping") (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting on other grounds).

10. *See also Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (hair length policy is not actionable as sex discrimination under Title VII); *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (employer's grooming policy could be different for men and women and not violate Title VII); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (employer's grooming code requiring different hair length for men and women is not discrimination on the basis of sex under Title VII); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974) (employer's tolerance of different hair length for female and male employees did not discriminate on the basis of sex under Title VII), *cert. denied*, 422 U.S. 1046 (1975). Even the Ninth Circuit has

(Cont'd)

Second, even if *Price Waterhouse* properly could be read to stand for the proposition that a gender-stereotyping cause of action existed in some circumstances, those circumstances are narrow. The sexist comments about Hopkins all pertained to her *on-the-job* conduct: her relationships with, and the way she presented herself to, co-workers and staff. Nothing in *Price Waterhouse* proscribes adverse actions other than those based on workplace behavior.

The instant case is far from the narrow stereotyping theory that the lower courts recognized in Hopkins' case. As the Ninth Circuit dissenters pointed out, Pet. App. 21a, Rene was crystal clear throughout that he was asserting a sexual orientation claim, not a "stereotyping" claim, *see supra* n.2. Moreover, Rene's case cannot be restyled as a stereotyping claim. In *Price Waterhouse*, Hopkins was criticized for her on-the-job behavior. The lower courts regarded the criticisms as sexist (and this Court assumed for purposes of its decision that they were). The important point is that the stereotyping related to how Hopkins presented herself *on the job*. Recognizing a gender-based disparate treatment claim based on workplace conduct by the employee — *e.g.*, where a man is lauded for being "aggressive" and a

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(Cont'd)

allowed that "not . . . all [stereotypical] gender-based distinctions are actionable." *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001). That court continued, "[f]or example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards." *Id.* The Ninth Circuit thus asserted a distinction without explaining the difference. Dress and grooming codes also are based on gender-based stereotypical assumptions, and the Ninth Circuit offered no explanation of which such stereotypes are lawful and which are not.

woman is criticized for being "pushy" (or worse) — is appropriately tethered to the statutory proscription of gender discrimination; indeed, it is classic disparate treatment. But recognizing stereotyping claims (as Judge Pregerson's concurring opinion does) based on gender stereotypes unrelated (or only marginally related) to on-the-job behavior would expand Title VII's five enumerated bases beyond all recognition. Under the stereotyping rationale:

- A bald woman might sue for gender discrimination because she does not conform to the stereotype that women should have hair.

- A fat man might sue for gender discrimination, because his physique differs from the stereotype of the physically fit male.

- Or, as here, a gay man might sue for gender discrimination because his sexual orientation does not comport with the male stereotype of attraction to women.

There is no logical stopping point once one entertains "stereotyping" claims beyond the narrow category of gender-based disparate treatment for on-the-job behavior.

Thus, both the plurality (in departing from *Oncale*) and the concurrence (in distorting *Price Waterhouse*) conflict with this Court's precedents. The plurality erroneously presumed that all matters sexual necessarily are based on the plaintiff's gender. And the concurring judges erroneously presumed that animus based on sexual orientation necessarily implicates a gender stereotype, and that all gender stereotypes necessarily are actionable under the rubric of "sex."

II. The Ninth Circuit's Decision Conflicts With That Of Every Other Court Of Appeals To Consider The Issue

Both the plurality opinion and the concurring opinion conflict with the decisions of other circuits.

A. The Plurality's Decision Stands Alone.

Before *Oncale*, courts consistently held that Title VII did not prohibit sexual orientation discrimination. *E.g.*, *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation . . . ."); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("[D]ischarge for homosexuality is not prohibited by Title VII . . . ."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (harassment based on sexual orientation is not cognizable under Title VII).

After *Oncale*, courts recognized the possibility of same-sex harassment claims, but (other than the Ninth Circuit) all courts require the plaintiff to prove that the harassment occurred because of gender. "Sexual orientation," the cases emphasize, is not the same thing as "sex," and the inherently sexual nature of a sexual harassment claim does not constitute (let alone obviate) proof of a gender-based motivation. *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002), is illustrative. That plaintiff was harassed at work because he was gay. He sued under Title VII. The court agreed that harassment on the basis of sexual orientation is a "noxious practice" that is "deserving of censure and opprobrium," but held that Title VII covers only gender-based harassment, not sexual orientation harassment. *Id.* at 265. The court emphasized

that the plaintiff needed to establish that he was discriminated against because he was *male*, not just because he was *gay*. *Id.* at 264.

Similarly, in *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001), the plaintiff sued for harassment due to his sexual orientation. The court held that such harassment, while unfortunate, is not an unlawful employment practice under Title VII. *Id.* at 1084. Same-sex harassment can be actionable, but — as *Oncale* taught — it must be shown to be "because of . . . sex." *Id.* "Sex" means "biological male" or "biological female" — not one's sexuality or sexual orientation. *Id.* at 1084-85.

Other circuits have held similarly. *E.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (". . . Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (Title VII's prohibition against discrimination based on "sex" does not extend to discrimination based on sexual orientation, as "sex" means gender); *Norris v. Diakin Drivetrain Components*, 46 Fed. Appx. 344, 345 (6th Cir. 2002) (discrimination based on sexual orientation is different from discrimination based on "sex" and is not actionable under Title VII); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998) (plaintiff in a same-sex sexual harassment claim is still required to prove that the discrimination suffered was "'because of' . . . sex"), *cert. denied*, 528 U.S. 930 (1999).

The plurality opinion, in holding motivation irrelevant in same-sex harassment cases, thus conflicts with every post-*Oncale* court of appeals decision.

B. The Concurring Opinion Makes The "Sex Stereotyping" Theory Boundless, Thereby Adding Disarray To An Already Confused Area Of The Law.

The facts of same-sex harassment cases are distressingly similar. The offensive words used are virtually identical. The offensive touching is virtually identical. But the results in the cases differ. If the case is pigeonholed as a "sexual orientation" case, the plaintiff loses; if the case is pigeonholed as a "gender stereotyping" case, in some courts the plaintiff wins (or, at least, gets to trial).

Numerous courts have dismissed cases based on the ground that Title VII does not cover conduct based on sexual orientation. But several opined in dictum that the result might have been different if the cases had been presented on a "sex stereotyping" theory.[11] The Ninth Circuit took the process of engrafting sexual orientation discrimination onto Title VII a step further in *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864, 874-75 (9th Cir. 2001) (reversing

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11. *See, e.g.*, *Bibby*, 260 F.3d at 262-63 (a plaintiff may be able to prove that same-sex sexual harassment was discrimination "because of . . . sex" by presenting evidence that the harasser was motivated by a belief that the plaintiff did not conform, in the workplace, to stereotypes of his gender); *Simonton*, 232 F.3d at 38 ("[T]he Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex."); *Spearman*, 231 F.3d at 1085 ("sex stereotyping may constitute evidence of sex discrimination" under Title VII); *Higgins*, 194 F.3d at 261 (a man may base a claim of discrimination under Title VII on evidence that other men discriminated against him because he did not project, in the workplace, stereotypical attributes of masculinity).

summary judgment using a stereotyping rationale). In *Nichols*, the victim was not openly gay, but based on his effeminate mannerisms the harassers determined that he was gay (in their unfortunate terminology, a "faggot"). *Id.* at 870. That three-judge Ninth Circuit panel (Reinhardt, Wardlaw, and Gould) pigeonholed the case as a stereotyping case, stating that the harassee "did not meet [the harassers'] views of a male stereotype." *Id.* at 869. The Ninth Circuit ruled as a matter of law "that this verbal abuse was closely linked to gender," *id.* at 874, and in so doing ignored the obvious: that the harassee's effeminate characteristics convinced his co-workers that he was gay, and that his sexual orientation motivated the harassment. In other words, the Ninth Circuit assumed that the harassment was motivated by perceived indicia of the plaintiff's sexual orientation (the effeminate characteristics) rather than the conclusion the harassers drew from the indicia (that the plaintiff was gay).

The concurring opinion here has taken *Nichols* to its ultimate conclusion, and charts a path in which every sexual orientation case can be repackaged to make it cognizable. The concurring judges simply assume in every same-sex harassment case that the harassers' motivation is the perceived indicia of sexual orientation, rather than the victim's orientation itself. The concurring judges here seem to believe that a plaintiff can take a sexual-orientation claim that is not cognizable and make it cognizable by reciting the word "stereotyping" in the Complaint — or even by having a judge recharacterize the case *for* the plaintiff, *see* Pet. App. 13a-14a n.2 (Pregerson, J., concurring) ("[G]ender stereotyping . . . is what Rene *meant* when he said that he was discriminated against because he was openly gay.") (emphasis both added and deleted). If the concurring judges accurately stated the law, the "stereotyping" exception would

consume the rule. Title VII's five bases for coverage — race, color, religion, national origin and sex — would be overrun if a person by artful pleading could state a claim simply by suggesting that he or she did not conform to a particular stereotype associated with one of the recognized bases. A clear conflict on this issue exists because — on virtually identical facts — cases like *Bibby*, *Higgins*, *Simonton* and *Spearman* found no Title VII coverage.

The law of same-sex harassment, partly addressed and partly left open by this Court in *Oncale*, thus is in total disarray. Courts like the Ninth Circuit are confusing cases involving animus based on status with animus based on conduct. To quote a commentator about the disarray:

> The Ninth Circuit's [*Nichols*] decision underscores the problems inherent in attempting to reconcile the *Oncale/Price Waterhouse* approach to sex-stereotype hostile-environment cases with the fact that Title VII does not protect against discrimination based on sexual orientation, given that the perception of how well an individual fits a certain stereotype applied to his or her gender is often intertwined with a judgment as to what that individual's sexual orientation is.

Analysis, 167 Lab. Rels. Rptr. (BNA) 384, 386 (2001). That analysis continued:

> The issue of motivation looms large in the space between the permissible sex-stereotype claim and the impermissible sexual-orientation claim, especially since many people appear to make

> a judgment as to what an individual's sexual orientation is based on his or her adherence to sexual stereotypes.

Id. at 387.

If the dictum in *Price Waterhouse* is the source of the confusion, the Court should clarify it. The essence of *Price Waterhouse* was not "stereotyping," but classic disparate treatment: the employer applauded aggressive behavior in men (and promoted men based on it), but did not value the same trait in women. If the "stereotyping" theory is viable at all, it must be narrowly applied to on-the-job conduct. The cases must enforce the distinction between (i) conduct on the job as the motivation for the harassment, and (ii) conduct on the job as evidence of sexual orientation, where the latter is the real motivation for the action. The "stereotyping" theory must be limited to the cases in which the employer's animus is directed at the manifestation of the stereotype on the job (*e.g.*, specific effeminate behaviors on the job), but not more broadly to the individual's sexual orientation. The concurring opinion here illustrates that the lower courts require guidance on when, if at all, the "stereotyping" rubric can be invoked to support a Title VII sexual-orientation suit.

CONCLUSION

The Ninth Circuit's *en banc* decision is inconsistent with this Court's precedents and conflicts with the decisions of other circuit courts of appeals. This Court should grant the petition for *certiorari*.

Respectfully submitted.

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APPENDIX

**UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.**

No. 98-16924.

Medina RENE,

Plaintiff-Appellant,

v.

MGM GRAND HOTEL, INC.,

Defendant-Appellee.

**Argued and Submitted En Banc Sept. 25, 2001.
Filed Sept. 24, 2002.**

Opinion by Judge WILLIAM A. FLETCHER; Concurrence by Judge PREGERSON; Concurrence by Judge GRABER; Concurrence by Judge FISHER; Dissent by Judge HUG.

WILLIAM A. FLETCHER, Circuit Judge.

This case presents the question of whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome "physical conduct of a sexual nature" in the workplace asserts a viable claim of discrimination based on sex under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq., even if that employee also alleges that the motivation for that discrimination was his sexual orientation. We would hold that an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the

harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct of a sexual nature. We therefore would hold that the plaintiff in this case has stated a cause of action under Title VII.

I.

Medina Rene, an openly gay man, appeals from the district court's grant of summary judgment in favor of his employer MGM Grand Hotel in his Title VII action alleging sexual harassment by his male coworkers and supervisor. The relevant facts are not in dispute. Rene worked for the hotel, located in Las Vegas, Nevada, from December 1993 until his termination in June 1996. He worked as a butler on the 29th floor, where his duties involved responding to the requests of the wealthy, high-profile and famous guests for whom that floor was reserved. All of the other butlers on the floor, as well as their supervisor, were also male.

Rene provided extensive evidence that, over the course of a two-year period, his supervisor and several of his fellow butlers subjected him to a hostile work environment on almost a daily basis. The harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex. On "more times than [Rene said he] could possibly count," the harassment involved offensive physical conduct of a sexual

nature. Rene gave deposition testimony that he was caressed and hugged and that his coworkers would "touch [his] body like they would to a woman." On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay.

On June 20, 1996, Rene filed a charge of discrimination with the Nevada Equal Rights Commission. He alleged that he "was discriminated against because of my sex, male" and indicated "I believe that my sex, male, was a factor in the adverse treatment I received." On April 13, 1997, Rene filed a complaint in federal district court, alleging that he had been unlawfully sexually harassed in violation of Title VII[1] and attaching a copy of his Nevada Equal Rights Commission charge. MGM Grand moved for summary judgment on the grounds that "claims of discrimination based on sexual orientation are not cognizable under Title VII[.]"

The district court agreed that Rene had failed to state a cognizable Title VII claim. In granting summary judgment in favor of MGM Grand, it concluded that "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference." Rene timely appealed.

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1. Rene also alleged retaliatory discharge. The district court's grant of summary judgment on that claim was not appealed and is not before us.

II.

We review a grant of summary judgment de novo. "[Our] review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). [We] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir.2001) (internal citations omitted).

III.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., provides that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . . . sex[.]" The Supreme Court made clear, more than 15 years ago, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), that sexual harassment violates Title VII. Rene alleged that he was sexually harassed by his male supervisor and male coworkers under the hostile work environment theory of sexual harassment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (noting "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality").

Appendix

In describing the kinds of sexual harassment that can create a hostile work environment, the Court in *Meritor* explicitly included "physical conduct of a sexual nature." *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)). We have applied this holding on numerous occasions, "explain[ing] that a hostile environment exists when an employee can show (1) that he or she was subjected to . . . physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir.1991). *See also Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 910 (9th Cir.2001); *Fielder v. UAL Corp.*, 218 F.3d 973, 985 (9th Cir.2000).

It is clear that Rene has alleged physical conduct that was so severe and pervasive as to constitute an objectively abusive working environment. It is equally clear that the conduct was "of a sexual nature." Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.

Physical sexual assault has routinely been prohibited as sexual harassment under Title VII. A limited sampling of the reported decisions includes *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 616 (8th Cir.2000) (groping and shoving broom handle in crotch); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir.1999) (patting buttocks); *Bailey v. Runyon*, 167 F.3d 466, 467 (8th Cir.1999) (grabbing crotch); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1067 (10th Cir.1998) (putting mouth on breast); *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1018 (7th Cir.

1996) (grabbing breast and rubbing buttocks); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1374 (8th Cir.1996) (grabbing and squeezing testicles and flicking groin); *Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1211 (8th Cir.1996) (grabbing breasts); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 140 (4th Cir.1996) (rubbing genitals against buttocks); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 472 (5th Cir.1989) (grabbing breasts and directing high pressure hose at crotch); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir.1988) (rubbing thighs and grabbing breasts); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1182 (7th Cir.1986) (pressing hands against crotch); *Jones v. Wesco Invs.*, 846 F.2d 1154, 1155 (8th Cir.1986) (touching breasts, pinching and patting buttocks). Such harassment — grabbing, poking, rubbing or mouthing areas of the body linked to sexuality — is inescapably "because of . . . sex." *See Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir.1997), vacated and remanded, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) ("[W]e have difficulty imagining when harassment of this kind would not be, in some measure, 'because of' the harassee's sex — when one's genitals are grabbed, . . . it would seem to us impossible to delink the harassment from the gender of the individual harassed."). The most extreme form of offensive physical, sexual conduct —rape—clearly violates Title VII. *See Little v. Windermere Relocation*, 265 F.3d at 912 ("Rape is unquestionably among the most severe forms of sexual harassment. . . . Being raped is, at minimum, an act of discrimination based on sex."); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir.1995) ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex.").

Appendix

In granting MGM Grand's motion for summary judgment, the district court did not deny that the sexual assaults alleged by Rene were so objectively offensive that they created a hostile working environment. Rather, it appears to have held that Rene's otherwise viable cause of action was defeated because he believed he was targeted because he is gay. This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.

The premise of a sexual touching hostile work environment claim is that the conditions of the work environment have been made hostile "because of . . . sex." *See Ellison*, 924 F.2d at 876. The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were "because of . . . sex." Whatever else those attacks may, or may not, have been "because of" has no legal consequence. "[S]o long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point." *Doe*, 119 F.3d at 578.

Our opinion today is guided by the principles established by the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). As recounted by the Court, the Title VII plaintiff in

Oncale had been "forcibly subjected to sex-related, humiliating actions" and had been "physically assaulted . . . in a sexual manner" by other males at his place of employment. *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. We know from the circuit court's opinion that this physical assault included, among other things, "the use of force by [one co-worker] to push a bar of soap into Oncale's anus while [another co-worker] restrained Oncale as he was showering [.]" *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir.1996). This behavior occurred, the Court noted, in an all-male workplace. Oncale was a male plaintiff who worked on an all-male off-shore oil drilling rig "as a roustabout on an eight-*man* crew." *See Oncale*, 523 U.S. at 77, 118 S.Ct. 998 (emphasis added). Oncale's employer, Sundowner, never employed women on any of its drilling rigs. *See* Joint App. at 76.

Based on these facts, the Supreme Court reversed the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed a grant of summary judgment in favor of the defendant-employer on the grounds that "same-sex harassment is not cognizable under Title VII." *Oncale*, 83 F.3d at 118. We take two lessons from the Court's decision in *Oncale*.

First, Title VII forbids severe or pervasive same-sex offensive sexual touching. The Court made clear that a plaintiff's action for sexual harassment under Title VII cannot be defeated by a showing that the perpetrator and the victim of an alleged sexual assault are of the same gender. The Court wrote,

> We see no justification in the statutory language or our precedents for a categorical rule excluding

> same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale, 523 U.S. at 79, 118 S.Ct. 998; *see also id.* at 78, 118 S.Ct. 998 ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." (citation and internal quotation omitted)). Thus, Oncale's cause of action could not be defeated based on the fact that he was tormented *by other men*.

Second, offensive sexual touching is actionable discrimination even in a same-sex workforce. The Court in *Oncale* made clear that "discrimination" is a necessary predicate to every Title VII claim. That is, a defendant's conduct must not merely be "because of . . . sex"; it must be " 'discriminat[ion] . . . because of . . . sex.' " *Oncale*, 523 U.S. at 81, 118 S.Ct. 998 (emphasis in original). The Court in *Oncale* held that "discrimina[tion] . . . because of . . . sex" can occur entirely among men, where some men are subjected to offensive sexual touching and some men are not. There were no women on Oncale's drilling rig; indeed, there were no women on any of his employer's oil rigs. Discrimination

is the use of some criterion as a basis for a difference in treatment. In the context of our civil rights laws, including Title VII, discrimination is the use of a *forbidden* criterion as a basis for a *disadvantageous* difference in treatment. "Sex" is the forbidden criterion under Title VII, and discrimination is any disadvantageous difference in treatment "because of . . . sex." The *Oncale* Court's holding that offensive sexual touching in a same-sex workforce is actionable discrimination under Title VII necessarily means that discrimination can take place between members of the same sex, not merely between members of the opposite sex. Thus, Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men.*

Viewing the facts, as we must, in the light most favorable to the nonmoving party, we are presented with the tale of a man who was repeatedly grabbed in the crotch and poked in the anus, and who was singled out from his other male co-workers for this treatment. It is clear that the offensive conduct was sexual. It is also clear that the offensive conduct was discriminatory. That is, Rene has alleged that he was treated differently — and disadvantageously — based on sex. This is precisely what Title VII forbids: "discriminat[ion] . . . because of . . . sex."

In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive "physical conduct of a sexual nature" when that conduct is sufficiently severe or pervasive. *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399. It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or

different genders. *See Oncale*, 523 U.S. at 79, 118 S.Ct. 998. And it prohibits such conduct without regard to the sexual orientation — real or perceived — of the victim.

There will be close cases on the question of what constitutes physical conduct of a sexual nature, for there are some physical assaults that are intended to inflict physical injury, but are not intended to have (and are not interpreted as having) sexual meaning. That is, there will be some cases in which a physical assault, even though directed at a sexually identifiable part of the body, does not give rise to a viable Title VII claim. But this is not such a case. Like the plaintiff in *Oncale*, Rene has alleged a physical assault of a sexual nature that is sufficient to survive a defense motion for summary judgment.

This opinion is joined by Judges Trott, Thomas, Graber, and Fisher. Judge Pregerson, in a separate opinion joined by Judges Trott and Berzon, reaches the same result but under a different rationale. Taken together, these two opinions are joined by a majority of the en banc panel. Accordingly, the district court's grant of summary judgment to MGM Grand is REVERSED, and the case is REMANDED for further proceedings.

PREGERSON, Circuit Judge, with whom TROTT and BERZON, Circuit Judges, join, concurring.

I concur in the result of Judge Fletcher's opinion. I write separately to point out that in my view, this is a case of actionable gender stereotyping harassment.

Appendix

More than a decade ago, the Supreme Court held that gender stereotyping is actionable under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). More recently, the Supreme Court held that "same-sex sexual harassment is actionable under Title VII." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). And only last year, we held that same-sex gender stereotyping of the sort suffered by Rene — *i.e.*, gender stereotyping of a male gay employee by his male co-workers — "constituted actionable harassment under . . . Title VII." *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir.2001).

Rene testified in his deposition that his co-workers teased him about the way he walked and whistled at him "[l]ike a man does to a woman." Rene also testified that his co-workers would "caress my butt, caress my shoulders" and blow kisses at him "the way . . . a man would treat a woman," hugged him from behind "like a man hugs a woman," and would "touch my body like they would to a woman, touch my face." Rene further testified that his co-workers called him "sweetheart" and "muñeca" ("doll"), "a word that Spanish men will say to Spanish women." This conduct occurred "many times." The repeated testimony that his co-workers treated Rene, in a variety of ways, "like a woman" constitutes ample evidence of gender stereotyping.[1]

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1. Thus, contrary to a claim in the dissent, there is much more evidence of gender stereotyping in the present case than only "one line in Rene's deposition of over one hundred pages." Diss. at 1077 note 4.

Appendix

The conduct suffered by Rene is indistinguishable from the conduct found actionable in *Nichols*. In that case,

> Male co-workers and a supervisor repeatedly referred to [the male gay plaintiff] in Spanish and English as "she" and "her." Male co-workers mocked [him] for walking and carrying his serving tray "like a woman," and taunted him in Spanish and English as, among other things, a "faggot" and a ". . . female whore."

256 F.3d at 870. We concluded in *Nichols* that "[the] rule that bars discrimination on the basis of sex stereotypes" set in *Price Waterhouse* "squarely applies to preclude the harassment here." *Nichols*, 256 F.3d at 874-75. More generally, we held that "this verbal abuse was closely related to gender," "occurred because of sex," and therefore "constituted actionable harassment under . . . Title VII." *Id.*

The similarities between *Nichols* and the present case are striking. In both cases, a male gay employee was "teased" or "mocked" by his male co-workers because he walked "like a woman."[2] And in both cases, a male gay employee was

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2. It is not significant that, unlike the male employee in *Nichols*, Rene did not testify that his co-workers teased him for "walking . . . 'like a woman,' " *id.* at 870, but only that his co-workers "teas[ed] [him] about the way [he] walk[ed] and . . . whistle[d] at [him] like a woman." There would be no reason for Rene's co-workers to whistle at Rene "like a woman," unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and that is what Rene meant when he said he was discriminated

(Cont'd)

referred to by his male-co-workers in female terms—"she," "her," and "female whore" in *Nichols*; "sweetheart" and "muñeca" ("doll") in the present case—to "remind[ ] [him] that he did not conform to their gender-based stereotypes." *Nichols*, 256 F.3d at 874. For the same reasons that we concluded in *Nichols* that "[the] rule that bars discrimination on the basis of sex stereotypes" set in *Price Waterhouse* "squarely applie[d] to preclude the harassment" at issue there, *Nichols*, 256 F.3d at 874-75, I conclude that this rule also squarely applies to preclude the identical harassment at issue here.[3] Accordingly, this is a case of actionable gender stereotyping harassment.

(Cont'd)

against because he was *openly* gay. Likewise, contrary to a claim in the dissent, it is not significant that Rene apparently perceived himself to be "masculine." Diss. at 1077. At issue is not what Rene perceived himself to be, but rather what his co-workers perceived him to be, and how they acted upon that perception.

3. It is also worth noting that the "butlers" that served the Grand Hotel's guests on the 29th floor were, for whatever reason, all male, as the term "butler" connotes. All-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms. *See, e.g.*, Margaret Stockdale, Michelle Visio, and Leena Batra, *The Sexual Harassment of Men: Evidence for a Broader Theory of Harassment and Sex Discrimination*, 5 Psychol. Pub. Pol'y & L. 630, 653-54 (1999) (stating that "Predominantly or exclusively male environments tend to be more sexualized and less professional than gender neutral environments," and finding that data from a Department of Defense sexual harassment survey "support the trend that same-sex sexually harassed men worked in more male-dominated workplaces than did other men"); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1755 n. 387

(Cont'd)

GRABER, Circuit Judge, concurring.

I concur in Judge W. Fletcher's opinion because the facts here are materially indistinguishable from the facts in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). If summary judgment in the employer's favor was inappropriate in that case, it is equally so in this one.

I write separately to note that I agree with Judge Hug's dissent on two issues that the majority opinion does not reach: (1) Title VII does not protect employees from discrimination because of sexual orientation and (2) Rene did not assert a theory of "sexual stereotyping."

FISHER, Circuit Judge, Concurring.

I concur in Judge Fletcher's opinion. Summary judgment is improperly granted where, as in this case, the "inference of discrimination" because of sex is "easy to draw." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The repeated physical attacks targeted at body parts clearly linked to Rene's gender constituted overwhelming evidence from which a jury could infer that the attacks were based, at least in part, on Rene's sex. *See* 42 U.S.C. § 2000e-2; *see also, e.g., Steiner v.*

(Cont'd)

(1998) ("[M]any male workers may view not only their jobs, but also the male-dominated composition and masculine identification of their work, as forms of property to which they are entitled."); *Oncale*, 523 U.S. at 77, 118 S.Ct. 998 (oil rig crew in which harassed male plaintiff worked was all male).

Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994) (holding that when abuse directed at women "center[s] on the fact that they [are] females," a jury may infer discrimination based on gender); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir.1997) ("Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender."), *vacated and remanded by* 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir.1996) (holding that "bagging" of testicles of men by other men in predominantly male workforce was "[e]vidence that members of one sex were the primary targets" of harassment "sufficient to show that the conduct was gender based for purposes of summary judgment"). The alleged abuse Rene suffered was also sufficiently hostile and abusive to distinguish it from "simple teasing and roughhousing among members of the same sex." *Oncale*, 523 U.S. at 82, 118 S.Ct. 998.

I also agree with Judge Pregerson that the many examples in which Rene was allegedly physically touched and verbally mocked by his harassers as being "like a woman" constituted ample evidence from which a jury could conclude that the harassment Rene endured was based on gender stereotyping. *See Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874-75 (9th Cir.2001).

HUG, Circuit Judge, with whom SCHROEDER, Chief Judge, FERNANDEZ, and T.G. NELSON, Circuit Judges, join, dissenting.

I respectfully dissent from Judge Fletcher's plurality opinion and Judge Pregerson's opinion concurring in the result, but expressing a different rationale for the result. The basis for Judge Fletcher's opinion is that harassment of a person in the workplace in the form of severe unwelcome physical conduct of a sexual nature is sufficient to establish a cause of action under Title VII of the Civil Rights Act, regardless of whether that harassment constitutes discrimination *because of* race, color, religion, gender, or national origin. I disagree because this completely eliminates an essential element of that statute, that the harassment be *because of* discrimination against one of the five specified categories of persons named in the statute. Judge Pregerson's opinion is based upon gender stereotyping harassment, which was never asserted by Rene in the district court and was not supported by evidence presented to the district court. In my opinion this is manufacturing a claim for Rene on appeal that was never advanced by him or supported by evidence in the district court.

I.

The basis of Judge Fletcher's opinion is well expressed in the following statement from the first paragraph:

> This case presents the question of whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome "physical conduct

> of a sexual nature" in the workplace asserts a viable claim of discrimination based on sex under Title VII of the 1964 Civil Rights Act. . . . It is enough that the harassers have engaged in severe or pervasive unwelcome physical conduct of a sexual nature.

This is a mischaracterization of the pertinent section of Title VII and the Supreme Court's interpretation of that section.

The pertinent section of Title VII provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a)(1) (emphasis added). Supreme Court decisions have made it clear that the term "sex" in that section refers to "gender." The terms "sex" and "gender" have been used interchangeably to mean "gender." Thus, it is discrimination based on "gender" that is prohibited. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Appendix

II.

I believe the following is a proper application of the statute as interpreted by the Supreme Court.

1. Title VII provides that it is an unlawful employment practice to *discriminate* against a person because of that person's race, color, religion, sex, or national origin.

2. Harassment on the job can be a form of discrimination. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

3. Thus, Title VII protects against harassment, as a type of discrimination on the job if it is because of race, color, religion, sex, or national origin. Harassment for other reasons, for example, because a person is short, fat, bald, disfigured, belongs to an unpopular social group, belongs to a particular political party, or engages in other activities outside the work-place, including sexual activities, that the harasser disfavors, is not actionable under Title VII.

4. Harassment on the job by physical assault or humiliation because a person is Asian, Black, a Jehovah's Witness, Polish, or because of the person's gender is actionable under Title VII because it is a type of discrimination and is against the particular classes of people protected by Title VII.

5. Title VII does not protect against physical assaults as a general matter. In order for an assault to be actionable

under Title VII it must be a *type of discrimination* against one of the five protected classes.

6. If a person is assaulted or otherwise harassed on the job in a sexual manner, it is a form of discrimination against that person. However, the assault or harassment is actionable under Title VII only if it is *because of* that person's race, color, religion, gender, or national origin.

7. Sexual harassment on the job can be a form of discrimination that is actionable under Title VII if it is *because of* the person's gender. For example, "when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex." *Meritor*, 477 U.S. at 64, 106 S.Ct. 2399 (emphasis added).

8. Discrimination because of sex (gender) can extend to sexual stereotyping on the job. For example, if a woman does not act on the job in the way her employers perceived she should act as a woman, as was the situation in *Price Waterhouse*, or if a man does not act on the job like it is perceived a man should, as was the situation in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir.2001), this can be sexual stereotyping and actionable under Title VII.

9. Discrimination in the form of harassment or assault on the job because of a man's activity *outside* the workplace, such as his sexual activities, is not a basis for discrimination based on gender stereotyping of how he is expected to work on the job. A person might conform

to all the stereotypes of masculinity on the job yet have a homosexual orientation in his own private life.

10. Discrimination based on gender can extend to discrimination against a person of one sex by a person of the same sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

III.

It is by now clear that sexual harassment can be a form of discrimination based on sex. *Meritor*, 477 U.S. at 64, 106 S.Ct. 2399. The Supreme Court stated: "Without question, when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex." *Id.* (emphasis added). In that case the evidence that a male supervisor made unwelcome sexual advances to a woman subordinate was sufficient to constitute discrimination based on sex.

Rene alleged that he was discriminated against because he was gay. Alleging a hostile work environment theory of sexual harassment, Rene alleged that he was sexually harassed by his male co-workers and a supervisor. To succeed on that theory, Rene must first prove that he was forced to endure a subjectively and objectively abusive working environment. *See Oncale*, 523 U.S. at 81, 118 S.Ct. 998; *Harris*, 510 U.S. at 21-22, 114 S.Ct. 367; *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir.2000). In this case, the parties do not dispute the existence of a hostile work environment, for there is no doubt that the harassment that Rene alleged was so objectively offensive that it created a

hostile work environment. The dispute is whether he was discriminated against because of his gender.

Rene relies on Oncale to make his case, contending that the Supreme Court impliedly held that discrimination based on sexual orientation is actionable under Title VII. This is a misreading of *Oncale*. That case did involve harassment of the male plaintiff by his male co-workers, some of which was similar to the harassment in this case. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of the employer on the ground that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. The sole issue before the Supreme Court on certiorari was whether same-sex sexual harassment is actionable under Title VII. The Court held that it was. However, the Supreme Court explained, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex.'" *Id.* at 80, 118 S.Ct. 998. Never has it been held "that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Rather, under Title VII, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of .. . . sex.' " *Id.* at 81, 118 S.Ct. 998.

Justice Thomas added a concurring opinion specifically to emphasize that the discrimination had to be "because of sex." The concurring opinion states:

> I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination "because of . . . sex."

Id. at 82, 118 S.Ct. 998. Thus, the Supreme Court in *Oncale* did not hold that the harassment alleged by the plaintiff in that case was actionable under Title VII. The Court, rather, simply rejected the Fifth Circuit's holding that same-sex harassment could never be actionable under Title VII. *See Oncale*, 523 U.S. at 82, 118 S.Ct. 998 ("Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed. . . ."); *id.* at 79, 118 S.Ct. 998 (criticizing the Fifth Circuit's view that "same-sex sexual harassment claims are never cognizable under Title VII").

After clarifying that same-sex sexual harassment could be actionable under Title VII, the Court remanded to the Fifth Circuit to address the question of whether the harassment was "because of sex," that is, whether the harassment was because of Oncale's gender. That issue had not been addressed by the district court or the circuit court because of the holdings of those courts that same-sex harassment could never be actionable under Title VII. The Court gave illustrations of how same-sex harassment could be "because of sex" and thus actionable under Title VII. Oncale had alleged both quid pro quo and hostile work environment sexual harassment in the district court. *Oncale v. Sundowner Offshore Servs., Inc.*,

83 F.3d 118, 119 (5th Cir.1996).[5] On remand, the lower courts were to address the question of whether this sexual harassment was because of his gender. There was no implication in the Supreme Court's opinion that the alleged sexual harassment was "because of sex." That determination, which had not been previously considered, was to be addressed by the lower courts on remand.

Judge Fletcher's opinion in effect interprets *Oncale* to mean that if the defendant's conduct was "sexual in nature" the statutory requirements of Title VII are met. The opinion then reasons that because the touching in this case was sexual in nature and was discriminatory, Rene has stated a claim under Title VII. This misinterprets *Oncale*. The *Oncale* Court did say that "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." 523 U.S. at 79, 118 S.Ct. 998. However, the Court qualified that by stating "Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind *that meets the statutory*

5. There is an implication in Judge Fletcher's opinion that because sexual touching was involved in Oncale's case the remand was a holding that this was sufficient. In the district court Oncale alleged both quid pro quo and hostile work environment sexual harassment, *Oncale*, 83 F.3d at 119, thus the remand was to consider both types of alleged harassment in light of the statutory requirement that it be because of his gender. Quid pro quo harassment is generally understood to be a supervisor seeking or insisting on sexual favors from an employee in order to maintain his or her job or to obtain advancement. This may have been involved in *Oncale*, but was never alleged by Rene.

requirements." *Oncale*, 523 U.S. at 79-80, 118 S.Ct. 998 (emphasis added). Thus, the Court stressed that the harassment type of discrimination must meet the statutory requirement of "because of sex." Justice Thomas' concurrence emphasized that point. *Oncale*, 523 U.S. at 82, 118 S.Ct. 998. Differential treatment of an individual based only on conduct that is "sexual in nature" does not meet the statutory requirement.[6] The alleged harassment in this case was not on account of the plaintiff's sex, i.e., this plaintiff was not treated differently from all the other male butlers because he was male. Rene contended that he was treated differently because he was homosexual.

Title VII is not an anti-harassment statute; it is an anti-discrimination statute against persons in five specific classifications: race, color, religion, sex, or national origin. Harassment can be a type of discrimination against persons in one of those five specific classifications. However, in order

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6. One of the cases relied upon in Judge Fletcher's opinion is *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir.1997). It is noteworthy that the Supreme Court, in describing the treatments given this subject by various circuits, characterized that case as follows: "Still others suggest that work-place harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations." *Oncale*, 523 U.S. at 79, 118 S.Ct. 998. This is essentially the same argument being made by Judge Fletcher's opinion. Had the Supreme Court in *Doe* agreed with this proposition it would seem that it would have summarily affirmed. Instead, it vacated and remanded the case, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998). This is a strong indication that workplace harassment, which is simply "sexual in content," is not always actionable; the "because of sex" statutory requirement must be met before the harassment is actionable.

for harassment to be actionable it has to be a type of discrimination "because of" race, color, religion, sex, or national origin. There are many types of harassment in the workplace that are very offensive but are not actionable under the federal Title VII law.

While the Court held in *Oncale* that same-sex harassment can be actionable under Title VII, it did not hold that same-sex harassment because of sexual orientation is actionable under Title VII. The Court gave three examples of ways a plaintiff can prove that members of one sex can discriminate against members of the same sex because of gender. *Id.* at 80-81, 118 S.Ct. 998. These examples are not the exclusive ways, but rather are illustrative of same-sex harassment because of gender that could be actionable under Title VII.

First, the plaintiff could show that the harasser was motivated by sexual desire; this route, the Court stated, requires that there be "credible evidence that the harasser was homosexual." *Id.* at 80, 118 S.Ct. 998. Rene has presented no evidence that any of his harassers were homosexual, nor that they were in any way motivated by sexual desire. On the contrary, evidence presented by Rene suggests not that they desired him sexually, but rather that they sought to humiliate him because of his sexual orientation.

The second route identified by the Court for proving same-sex sexual harassment requires that the plaintiff demonstrate that he was "harassed in such sex-specific and derogatory terms by another [man] as to make it clear that the harasser [was] motivated by general hostility to the presence of [men] in the workplace." *Id.* Rene presented

no evidence of this form of harassment. In fact, it is difficult to imagine how he could have; all of his co-workers on the 29th floor were male, and it would thus be strange indeed to conclude that their harassment of Rene was motivated by a "general hostility to the presence of [men] in the workplace." *Id.*

Third, the Court stated that a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 80-81, 118 S.Ct. 998. Rene cannot avail himself of this route because he worked on the 29th floor of the MGM Grand Hotel, where only men were employed.

In each of these illustrations the harassment type of discrimination is directed at a person because of that person's gender. Given the facts of the *Oncale* case itself, it is significant that the Supreme Court did not indicate that one of the ways a plaintiff can prove same-sex discrimination is harassment because of sexual orientation. In Rene's case he clearly stated in his deposition that the reason for the harassment was that he was gay. No other reason was offered to the district court.

In determining the motivation for harassment, courts must be mindful of the fact that Title VII protects against discrimination only on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Discrimination based on a victim's other characteristics, no matter how unfortunate and distasteful that discrimination may be, simply does not fall within the purview of Title VII. The Court in *Price Waterhouse* specifically made that point in quoting from

an interpretive memorandum entered in the Congressional Record by the co-managers in the Senate of the bill that became Title VII. The Court quoted the portion of the memorandum that stated:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any other criterion or qualification for employment is not affected by this title.*

490 U.S. at 244, 109 S.Ct. 1775 (emphasis added).

This court recognized that fact more than twenty years ago in *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir.1979), when we held that discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII. While societal attitudes toward homosexuality have undergone some changes since *DeSantis* was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation; this aspect of DeSantis remains good law and has been followed in other circuits. *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir.1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989) (per curiam).

More recently the Third Circuit in *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir.2001), *cert. denied*, 534 U.S. 1155, 122 S.Ct. 1126, 151 L.Ed.2d 1018 (2002), held that harassment based on sexual orientation is not actionable under Title VII. The allegations of harassment in that case, as in this one, were solely based on harassment because of sexual orientation. The court stated:

> [I]t is clear that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion] . . . because of . . . sex.*'" *Oncale* at 81[, 118 S.Ct. 998]. Bibby simply failed in this respect; indeed, *he did not even argue that he was being harassed because he was a man and offered nothing that would support such a conclusion*. There was no allegation that his alleged harassers were motivated by sexual desire, or that they possessed any hostility to the presence of men in the workplace or in Bibby's particular job. *Moreover, he did not claim that he was harassed because he failed to comply with societal stereotypes* of how men ought to appear or behave. . . . His claim was, pure and simple, that he was discriminated against because of his sexual orientation. *No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man.*

Id. at 264 (some emphasis added).

If sexual orientation is to be a separate category of protection under Title VII, this is a matter for Congress to enact. Over the years since the passage of Title VII, numerous bills have been introduced to include sexual orientation as a protected classification.[7] None has passed.

IV.

In *Price Waterhouse*, the Supreme Court held that discrimination based on sex stereotyping was a type of gender discrimination that is actionable under Title VII. The Court held that a woman, who was denied partnership in an accounting firm in part because she did not conform to what some of the partners thought was the appropriate way a woman should act, had an actionable claim under Title VII.

The Court noted:

> There were clear signs . . . that some of the part-ners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho"; another suggested that she "over-compensated for being a woman"; a third advised

7. Among those introduced and failed to be passed are the Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); the Employment Non Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); the Employment Nondiscrimination Act of 1996, S.2056, 104th Cong. (1996); and the Employment Nondiscrimination Act of 2001, S.19, 107th Cong. (2001). The stated purposes of this last act were to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation and to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation.

> her to take "a course at charm school." Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." . . . [Another advised her that she] should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Price Waterhouse, 490 U.S. at 235, 109 S.Ct. 1775 (internal citations to record omitted). The Court noted that the district judge had concluded "that the reactions of at least some of the partners were reactions to her as a *woman* manager." *Id.* at 258, 109 S.Ct. 1775. Thus, in *Price Waterhouse*, there was substantial evidence that part of the reason the plaintiff was denied a partnership was that her actions on the job did not conform to those expected of a woman manager. Yet the same actions would have been tolerated, or perhaps encouraged, in a male manager.

Recently, we held in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir.2001), that harassment of a male waiter by male workers and a supervisor amounted to harassment because of sex stereotyping and thus was discrimination because of gender. In that case the plaintiff presented evidence that the harassment was because he acted too feminine on the job. He was taunted for walking and carrying his serving tray like a woman and for having feminine mannerisms. He was harassed because he did not act on the job as his co-workers perceived he should act as a man, not just because of his sexual orientation. 256 F.3d at 874-75. This corresponds to the sex stereotyping described in *Price Waterhouse*.

Appendix

In Rene's case there was no contention before the district court that the harassment Rene experienced was because he acted effeminately on the job, or for any reason other than his sexual orientation. The first line of the legal argument presented to the district court in opposition to the motion for summary judgment crystallizes this point in stating:

> The question raised by the motion is whether the conduct as alleged by Rene is prohibited by Title VII even though it was directed at Rene because of his sexual orientation.

Rene made no claim of sexual stereotyping and there was virtually no evidentiary basis upon which Rene could have supported such a claim had it been made. In fact, at one point in his deposition in referring to another worker who had harassed him, he stated: "He's skinny. He is not masculine like I am."[8]

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8. Judge Pregerson's opinion contends that the discrimination against Rene was a form of sexual stereotyping. The only evidence that was discovered to support this contention in the entire record is one line in Rene's deposition of over 100 pages. The question refers to a note that Rene made concerning harassment he had experienced from Elisio, one of the butlers, toward the end of Rene's employment. The relevant questions and answers in the deposition are:

> Q. And in this note he's teasing you about the way you walk and he whistles at you like a woman; is that right?
>
> A. Right. Like a man does to a woman.

(Cont'd)

Appendix

Rene himself repeatedly stated that his co-workers harassed him because of his sexual orientation. On no fewer than nine occasions during his deposition, Rene affirmed that his co-workers harassed him only because he was gay. At least some of these statements bear mentioning:

> Q. Do you think he did it to you and Carlos because you were gay?
>
> A. Yes.
>
> . . . .

(Cont'd)

> Q. And that's what you report on the third page of Exhibit 39 as well, that Elisio is whistling at you as a man does to a woman?
>
> A. Correct.
>
> . . . .
>
> Q. Was he whistling at you think to make fun of you because you were gay?
>
> A. Yes. Of course. The way he looked at me, you know, and winked his eye. Come on. First of all, Rene's response, "Right. Like a man does to a woman," is obviously a response confirming the whistling, not the way he walks. Furthermore, later questions and answers confirm that the whistling was because he was gay, not because of the way he walked. It is significant that Rene never contended to the district court that the basis for the discrimination was sexual stereotyping because of the way Rene walked or any other characteristic he exhibited at the workplace.

Q. It was just because you were gay?

A. Right.

. . . .

Q. And that again was directed at you and Carlos—

A. Right.

Q. —because you were gay?

A. Right.

. . . .

Q. They were teasing you because you and Carlos are gay?

A. Correct.

Q. Did any of the other guys ever get teased about the relationships they were in that you recall?

A. No.

. . . .

Q. And they did this specifically because you were gay?

A. Yes. To them it was a joke.

Moreover, as I explained earlier, Rene did nothing to show the district court that the harassment was because of his gender. Instead, he stated quite plainly in his written presentation to the court that the question presented was whether the conduct he alleged "is prohibited by Title VII *even though it was directed at [him] because of his sexual orientation*." (Emphasis added.)

V.

The degrading and humiliating treatment Rene describes is appalling and deeply disturbing. I agree with the eloquent words of the First Circuit:

> We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.

Higgins, 194 F.3d at 259.

Rene's lawsuit was brought solely on the basis that he was harassed in the workplace because of his sexual orientation, which is not actionable under Title VII of the Civil Rights Act; therefore the summary judgment was properly entered. I would affirm the district court.

**UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.**

No. 98-16924.

Medina RENE,

Plaintiff-Appellant,

v.

MGM GRAND HOTEL, INC.,

Defendant-Appellee.

**Argued and Submitted Feb. 11, 2000
Filed March 29, 2001.**

Before: HUG, D.W. NELSON and McKEOWN, Circuit Judges.

OVERVIEW

HUG, Circuit Judge:

This case presents the question whether a plaintiff who alleges discrimination based on sex under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, may defeat a summary judgment motion when the evidence he presents supports only the claim that he was discriminated against because of his sexual orientation. We conclude that he may not.

Appendix

Medina Rene appeals from the district court's summary judgment in favor of defendant MGM Grand Hotel in his action under Title VII alleging that he was harassed by his male co-workers and supervisor because he is gay. The district court granted MGM's motion for summary judgment, concluding that Title VII's prohibition of discrimination because of a person's sex does not apply to discrimination based on sexual orientation.[1] We affirm.

I. BACKGROUND

The record of events in this case is not in dispute before this court. From December 1993 to June 1996, Medina Rene, an openly gay man, was employed by the MGM Grand Hotel in Las Vegas, Nevada, and worked as a butler on the 29th floor, which was reserved for high-profile and wealthy guests. All of the employees assigned to the floor were male. Rene's responsibilities included responding to the requests of guests staying on that floor.

Rene provided extensive evidence that from approximately February 1994 to February 1996, his supervisor, Tang Lam, and several of his co-workers subjected him to a hostile work environment. According to Rene, the harassment took place "practically every day," and comprised a panoply of markedly crude, demeaning, and sexually oriented activities.

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1. The district court also granted summary judgment on a claim by Rene for retaliatory discharge. That decision was not appealed and is not before us.

Appendix

Rene's brief on appeal states:

> The sexual harassment consisted of, among other things, being grabbed in the crotch and poked in the anus on numerous occasions, being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and being called "sweetheart" and "Muneca."[2] When asked why he believed his co-workers engaged in the conduct Rene responded that it was because he is gay.

His complaints to superiors were of no avail.

On April 13, 1997, Rene filed a complaint in federal district court, alleging that he had been unlawfully sexually harassed in violation of Title VII. He included a copy of his charge of discrimination filed with the Nevada Equal Rights Commission, wherein he alleged that he was "discriminated against because of my sex, male . . ." MGM moved for summary judgment on the grounds that any harassment Rene experienced was not due to his sex, but solely due to his sexual orientation.

The district court analyzed the issues raised by Rene's complaint as "whether harassment based on a person's sexual orientation is actionable under Title VII." It then granted summary judgment in favor of MGM, concluding that "Title VII's prohibition of 'sex' discrimination applies only [to]

2. "Muneca" means doll in Spanish.

discrimination on the basis of gender and is not extended to include discrimination based on sexual preference."

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir.1994). "[We] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." Balint v. Carson City, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

III. DISCUSSION

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., provides that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual . . .. because of . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). It is by now clear that sexual harassment is a form of discrimination based on sex. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). Rene alleged that he was sexually harassed by his male co-workers and supervisors under the hostile work environment theory of sexual harassment. To succeed on that theory, Rene must first prove that he was forced to endure a subjectively and objectively abusive working environment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140

L.Ed.2d 201 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir.2000). In this case, the parties do not dispute the existence of a hostile working environment, for there is no doubt that the harassment that Rene alleged was so objectively offensive that it created a hostile work environment. There is also no dispute that the harassment visited upon Rene occurred because he was an openly gay man.

Rene relies on Oncale to make his case, contending that the Supreme Court impliedly held that discrimination based on sexual orientation is actionable under Title VII. This is a misreading of Oncale. That case did involve harassment of the male plaintiff by his male co-workers, some of which was similar to the harassment in this case. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of the employer on the ground that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. The sole issue before the Supreme Court on certiorari was whether same-sex sexual harassment is actionable under Title VII. The Court held that it was. However, the Supreme Court explained, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.' " *Id.* at 80, 118 S.Ct. 998. Never has it been held "that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Rather, under Title VII, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connota-

tions, but actually constituted 'discrimina[tion] . . . because of . . . sex.' " *Id.* at 81, 118 S.Ct. 998; *see also id.* at 82, 118 S.Ct. 998 (Thomas, J., concurring) ("[T]he plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.' ").

Thus, the Supreme Court in Oncale did not hold that the harassment alleged by the plaintiff in that case was actionable under Title VII. The Court, rather, simply rejected the Fifth Circuit's holding that same-sex harassment could never be actionable under Title VII. See Oncale, 523 U.S. at 82, 118 S.Ct. 998 ("Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed."); *id.* at 79, 118 S.Ct. 998 (criticizing the Fifth Circuit's view that "same sex sexual harassment claims are never cognizable under Title VII.").

The *Oncale* Court gave three examples of ways a plaintiff can prove that members of one sex could discriminate against members of the same sex based on gender. *Id.* at 80-81, 118 S.Ct. 998. First, the plaintiff could show that the harasser was motivated by sexual desire; this route, the Court stated, requires that there be "credible evidence that the harasser was homosexual." *Id.* at 80, 118 S.Ct. 998. Rene has presented no evidence that any of his harassers were homosexual, nor that they were in any way motivated by sexual desire. On the contrary, evidence presented by Rene suggests not that they desired him sexually, but rather that they sought to humiliate him because of his sexual orientation.

The second route identified by the *Oncale* Court for proving same-sex sexual harassment requires that the plaintiff demonstrate that he was "harassed in such sex-specific and derogatory terms by another [man] as to make it clear that the harasser [was] motivated by general hostility to the presence of [men] in the workplace." *Id.* Rene presented no evidence of this form of harassment. In fact, it is difficult to imagine how he could have; all of his co-workers on the 29th floor were male, and it would be thus be strange indeed to conclude that their harassment of Rene was motivated by a "general hostility to the presence of [men] in the workplace."

Third, the Court stated that a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 80-81, 118 S.Ct. 998. Rene cannot avail himself of this route because he worked on the 29th floor of the MGM Grand Hotel, where only men were employed. Given the facts of the Oncale case itself, it is significant that the Supreme Court did not indicate that one of the ways a plaintiff can prove same-sex discrimination is discrimination based on sexual orientation.

In determining the motivation for harassment, courts must be mindful of the fact that Title VII protects against discrimination only on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). It is, perhaps, clearer to recognize that the term "sex" refers to gender. In the context of Title VII these terms are used interchangeably. *See Harris*, 510 U.S. at 22, 114 S.Ct. 367. Discrimination based on a victim's other characteristics, no matter how unfortunate and distasteful that discrimination may be, simply does not fall within the purview of Title VII. This court

recognized that fact more than twenty years ago in *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), when we held that discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII. While societal attitudes towards homosexuality have undergone some changes since DeSantis was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation; *DeSantis* remains good law and has been followed in other circuits. *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir.1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989). We are therefore bound to follow this construction of Title VII.

The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII. We agree with the eloquent words of the First Circuit:

> We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment-and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.

Higgins, 194 F.3d at 259.

Like the district court, we conclude that Rene has failed to raise a triable issue of fact with regard to whether the harassment he faced was motivated by his gender, and we therefore conclude that summary judgment was proper. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Rene himself repeatedly stated that his co-workers harassed him because of his sexual orientation. On no fewer than nine occasions during his deposition, Rene admitted that his co-workers harassed him only because he was gay. It bears mentioning at least some of these admissions:

> Q. Do you think he did it to you and Carlos because you were gay?
>
> A. Yes.
>
> . . . . .
>
> Q. It was just because you were gay?
>
> A. Right.
>
> . . . . .

Q. And that again was directed at you and Carlos—

A. Right.

Q. because you were gay?

A. Right.

. . . . .

Q. They were teasing you because you and Carlos are gay?

A. Correct.

Q. Did any of the other guys ever get teased about the relationships they were in that you recall?

A. No.

. . . . .

Q. And they did this specifically because you were gay?

A. Yes. To them it was a joke.

Moreover, as we explained earlier, Rene did nothing to show the district court that the harassment was based on his gender. Instead, he stated quite plainly that the question presented was whether the conduct he alleged "is prohibited by Title VII even though it was directed at [him] because of his sexual orientation."

The evidence that Rene presented would certainly allow a reasonable factfinder to conclude that Rene was harassed because of his sexual orientation; it would not, however, permit a reasonable factfinder to conclude that he was harassed because of his gender. Therefore, his Title VII claim must fail.[3]

IV. CONCLUSION

Accordingly, we hold that Rene has failed to carry his burden under Rule 56 of showing that the discrimination he endured was, in the words of Title VII, "because of . . . sex."

AFFIRMED.

D.W. NELSON, Circuit Judge, dissenting:

Same-sex sexual harassment is actionable under Title VII, see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), but discrimination because of sexual orientation is not. *See DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir.1979). The question before this court is whether countless sexual assaults of an openly gay employee by male co-workers over the course

3. This is not to say, however, that someone who suffers the abusive treatment allegedly endured by Rene is without recourse. Such a victim has available to him a myriad of state tort claims, such as battery, negligence, intentional infliction of emotional distress, and others. Thus, while we are appalled by the barbaric treatment that Rene endured, and hold that he can find no refuge in Title VII based on his evidence in the district court, we note that such conduct is not immune from other legal recourse.

of more than two years of employment can constitute discrimination on the basis of sex. The majority answers in the negative, and I respectfully dissent.

Although the majority contends that the facts of *Oncale* are essentially irrelevant to the narrow question presented on certiorari, the Supreme Court was not making an advisory decision. If the facts of Oncale did not potentially support a case of sex discrimination, there would have been no basis for a remand to the lower courts. The majority unwisely glosses over the strong similarity between the facts of *Oncale* and those of the present case. In *Oncale*, a man employed as a roustabout on an offshore oil platform was "forcibly subjected to sex-related, humiliating actions against him" by male co-workers, "physically assaulted in a sexual manner," and threatened with rape. *Id.* at 77, 118 S.Ct. 998. In the present case, Medina Rene testified in a deposition that nearly every day that he worked on the 29th floor of the MGM Grand Hotel, co-workers would insert their fingers into his anus through his clothing, grab his crotch, and caress his face and touch his body "like they would do to a woman."

The major difference between *Oncale* and the present case is that Rene is openly gay and testified that he thought he was being abused because of his sexual orientation. Surely that is not enough to defeat his Title VII claim. The subjective belief of the victim of sexual harassment that there is a non-sex-related reason for the harassment is immaterial. The only subjective component relevant to the determination of sexual harassment involves whether the employee perceives his or her workplace as hostile or abusive. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23, 114 S.Ct. 367, 126 L.Ed.2d

295 (1993). In the context of male-female sexual harassment, the act of harassment itself usually permits an inference of sex discrimination. *Oncale*, 523 U.S. at 80, 118 S.Ct. 998. There is no logical basis for inferring otherwise in the same-sex context, especially where the acts complained of involve sexual assaults targeting only one sex. The majority notes that the Supreme Court in *Oncale* gave three examples of successful same-sex harassment claims under Title VII. But the Oncale Court recognized that these examples are not an exhaustive list of meritorious Title VII claims. *Id.* at 80-81, 118 S.Ct. 998. To the extent that the majority limits Rene's grounds for relief to this non-exhaustive list, the majority fundamentally misreads *Oncale*.

While gay-baiting insults and teasing are not actionable under Title VII, a line is crossed when the abuse is physical and sexual. None of the cases cited by the majority to show that sexual orientation falls outside Title VII involves sexual assault. Rather, they involve verbal abuse, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 (1st Cir.1999); reprimands for wearing makeup at work as well as allegedly false accusations that an employee was disrupting the work-flow by discussing his sex life, *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989); and dismissal from work for wearing an earring and verbal harassment, *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 328-29 (9th Cir.1979). The fourth case cited, *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 144 (4th Cir.1996), held that a same-sex hostile work environment claim may lie under Title VII where the harasser is gay.

Unlike the plaintiffs in the above-mentioned cases, Rene has alleged that his attackers shoved their fingers into his anus and grabbed at his genitals. If his attackers were women or if they were gay men-or if Rene were a lesbian attacked by straight men-there is no question that the plaintiff's openly gay status would not be a complete defense to his Title VII claim. Nor would sexual orientation provide a defense for a gay male who harasses a female employee. That Rene's attackers were ostensibly heterosexual men is no basis for a different outcome-the attack was homosexual in nature, and his case involves allegations of sexual abuse that female employees did not have to endure. Rene's attackers may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming their own heterosexuality, or any combination of a myriad of factors, the determination of which falls far beyond the competence of any court. The effect was to humiliate Rene as a man. Enforcing Title VII in the mixed-gender context does not involve determining which pleasure center in the attackers' brains was stimulated by the attacks, nor should it in this case.

Finally, the majority takes consolation from the fact that state law remedies could have been available to Rene. But the two-year Nevada statute of limitations has run for the tort claims he might have brought. *See* Nev.Rev.Stat. §§ 11.190(4)(c) & (e). Because of the majority's holding, the appalling conduct alleged by Rene is "immune from other legal recourse."

UNITED STATES DISTRICT COURT,
DISTRICT OF NEVADA

No. 98-16924.

Medina RENE,

Plaintiff,

v.

MGM GRAND HOTEL, INC.,

Defendant.

ORDER

Before the Court for consideration is Defendant's Motion for Summary Judgment (#14) filed June 10, 1998. Plaintiff filed an Opposition (#18) on July 27, 1998, to which Defendant Replied (#19) on August 10, 1998.

The issues presented by Defendant's Motion for Summary Judgment are straight forward. They are whether harassment based on a person's sexual orientation is actionable under Title VII, and whether Plaintiff's claim of retaliatory discharge is viable on the record of this case.

The Court finds that Plaintiff has failed to state a claim which is cognizable under Title VII. Title VII's prohibition of "sex" discrimination applies only discrimination on the basis of gender and is not extended to include discrimination based on sexual preference. *Desantis v. Pacific Telephone and Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 1989) and *Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 118 S. Ct. 998 (1998). Additionally, Plaintiff has failed to

produce evidence that his termination by Defendant was in any way related to his complaints of harassment. Thus, Defendant is entitled to summary judgment on Plaintiff's claim for retaliatory discharge under Title VII.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (#14) is granted and that the Clerk of Court shall forthwith enter Judgment in favor of Defendant and against Plaintiff.

DATED: September 1, 1998

Philip M. Pro
United States District Judge

42 U.S.C. § 2000E-2

§ 2000e-2. Unlawful employment practices

Employer practices. It shall be an unlawful employment practice for an employer —

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex, or national origin.

Supreme Court, U.S.
FILED
FEB 10 2003
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No. 02-970

In The

Supreme Court of the United States

MGM GRAND HOTEL, LLC,

Petitioner,

v.

MEDINA RENE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether summary judgment improperly was granted against an employee who, in his action brought under Title VII of the Civil Rights Act of 1964, provided extensive evidence that his supervisor and coworkers subjected him to severe and pervasive harassment because of sex?

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Henry R. Weinstein & Lisa Girion, *Gay Man's Sexual Harassment Lawsuit Ruled Worthy of Trial*, L.A. TIMES, Sept. 25, 2002, at A18 4

STATEMENT OF THE CASE

In considering the motion for summary judgment filed by Petitioner MGM Grand Hotel, LLC ("Petitioner"), the courts below had before them "extensive evidence" that, for two years, Respondent Medina Rene ("Respondent" or "Rene") was subjected by his supervisor and fellow employees "to a hostile work environment on almost a daily basis." Petitioner's Appendix ("App.") at 1a.[1] The harassment was severe and pervasive and was based on Respondent's being male, as well as on his supervisor's and co-workers' view that he did not meet their stereotypical expectations of how men should act. Respondent testified at his deposition that he was harassed in these ways "practically every day" he worked for Petitioner, and that this harassment included, among other things, many instances of other employees grabbing his male genitals and shoving their fingers into his anus. See App. at 3a.

Numerous facts showed that Respondent's sex was a motivating factor for this near-daily harassment, including the nature of the physical assaults to which he was subjected; his harassers' repeated attempts to disparage his manhood by subjecting him to gender-based, humiliating pranks and treating him as if they were making sexual advances to a woman; his harassers' use of female terms of

[1] Petitioner's Statement of the Case erroneously suggests that Respondent was harassed only by "nonsupervisory co-workers." See Petition for Certiorari ("Pet.") at 2, 4. To the contrary, Respondent alleged and submitted substantial evidence that his direct supervisor also was an active perpetrator of the harassment. See App. at 2a. Respondent also disputes Petitioner's assertion that there was any valid reason for Petitioner to terminate him after he filed complaints about being sexually harassed. See *id.*

endearment to refer to him; and their mean-spirited teasing of him at work about the way he walked. See App. at 2a-3a, 12a.

Respondent complained to Petitioner, to the Nevada Human Rights Commission and the EEOC, and to the federal district court about discrimination because of his sex (not his sexual orientation) and sexual harassment (not sexual orientation harassment).[2] Notwithstanding this, Petitioner repeatedly has attempted to use the fact that Respondent is gay to recharacterize this case as one only about sexual orientation discrimination.[3]

The district court was misled by Petitioner's arguments and granted summary judgment against Respondent. Ignoring evidence that Respondent was harassed because of his sex, the district court ruled that Respondent had failed to state a claim cognizable under Title VII because that law does not "include discrimination based on sexual preference." App. at 50a. Similarly, the majority of the original panel of the Court of Appeal concluded that Rene's harassment was based only on his sexual orientation,

---

[2] See App. at 3a.

[3] Contrary to Petitioner's assertion, see Pet. at 2, sexual orientation discrimination and harassment was not Respondent's "theory of the case." Rather, Rene's Complaint alleged that he was sexually harassed and made no reference to his sexual orientation. Likewise, in his opposition to Petitioner's motion for summary judgment and briefs to the Court of Appeal, Respondent focused principally on how his sexual orientation did not *defeat* his having a claim for sexual harassment and how, but for his being male, he would not have been harassed as he was. As explained below, Respondent's answers to Petitioner's deposition questions also do not determine Respondent's theory of the case or undermine his claim that his sex was one of the motivating factors for the harassment he suffered.

which it held "does not fall within the prohibitions of Title VII." App. at 43a.

Sitting en banc, the Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. No opinion of the en banc court commanded a majority. Although seven of the eleven judges agreed that summary judgment should be reversed, *none* of the members of the en banc panel concluded that sexual orientation discrimination is prohibited by Title VII. Rather, a five-judge plurality held that the fact that Rene was gay was simply irrelevant, App. at 1a, 7a, and three judges who concurred in the result (one of whom also joined the plurality) relied not on Rene's sexual orientation, but on "ample evidence" that the harassment – which involved, among other things, calling Rene feminine names and treating him "like a woman"– was based on the harassers' perception that Rene was not sufficiently masculine. App. at 12a-14a.

Petitioner's characterizations of these opinions is misleading. The plurality opinion did not hold that "gender is not the issue" in a sexual harassment case. See Pet. at 6. Rather, the plurality followed this Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), that an employee can sue for sexual harassment by members of the same sex when he shows that "he suffered discrimination" because of his sex. App. at 10a. Likewise, contrary to Petitioner's arguments, Pet. at 6, the plurality *expressly* disclaimed the view that a viable Title VII claim would exist in every case in which an employee suffers a physical assault directed at a sexually identifiable part of the body. App. at 11a. Instead, the plurality concluded only that Respondent had presented enough "to survive a defense motion for summary judgment," *id.*, because he

adequately had shown that, in his case, the offensive conduct to which he was subjected not only "was sexual," but also "was discriminatory." App. at 10a.

Similarly, the concurrence joined by three judges – which neither expressly agreed nor disagreed with the rationale of the plurality opinion – did not hold that sexual orientation harassment is actionable under Title VII. See Pet. at 7, 20. Rather, these judges concluded that the evidence thus far presented of co-workers teasing Respondent at work about the way he walked, referring to him by feminine terms, and "in a variety of ways" treating him "'like a woman'" was sufficient to overcome Petitioner's motion for summary judgment. That determination was based on direct precedent permitting reliance on evidence of gender stereotyping as a way of showing discrimination because of sex. App. at 12a.

As Petitioner itself has stated to the press, this case remains at a stage where Respondent's allegations have not yet "been established" because they "have never been before a jury." Henry R. Weinstein & Lisa Girion, *Gay Man's Sexual Harassment Lawsuit Ruled Worthy of Trial*, L.A. TIMES, Sept. 25, 2002, at A18. All that the seven judges who voted to remand agreed on was that Respondent should be given the opportunity to establish those allegations, and that he should not be precluded from doing so at this stage of the proceedings simply because he is gay. As demonstrated below, this case accordingly does not present any cert.-worthy questions and is not in a posture where review by this Court would be warranted.

REASONS FOR DENYING THE PETITION

Petitioner lists three questions as presented in this case. Pet. at i. The first question – "Whether Title VII of the Civil Rights Act of 1964 prohibits harassment based on sexual orientation" – is not presented here because none of the judges on the en banc court below ruled that harassment based on sexual orientation is prohibited by Title VII. The Ninth Circuit's precedent is to the contrary and is in accord with the other courts of appeal that have ruled on the issue.

The second question – "Whether Title VII harassment cases are cognizable without proof that the harassment occurred 'because of . . . sex' – also is not presented here. Once again, no opinion below so ruled. Instead those opinions presented different ways in which Respondent might show that he was harassed because of his sex, with no opinion garnering more than five votes of the eleven-member en banc panel. As a result, the most that can be said about the ruling of the en banc court is that a majority of the judges on the panel believed that factual issues precluded summary judgment and that Respondent should not be precluded from showing that he was harassed because of his sex solely due to his being gay.

The third question – "Whether a sexual orientation discrimination case becomes cognizable under Title VII if restyled as a case involving 'gender stereotyping'" – likewise is not presented here. First, this is not a "sexual orientation discrimination case." In addition, although eight of the eleven en banc judges agreed that evidence of gender stereotyping can be used to demonstrate that harassment is "because of . . . sex," four of those judges and one other expressed the view that this position had

not adequately been developed in the case, while six judges either ruled that Respondent had raised the issue adequately or expressed no view. In any event, this is not an issue appropriate for this Court's review at this time, because there is no split in the circuits on whether discrimination or harassment "because of . . . sex" can be shown through evidence of gender stereotyping. Thus, as demonstrated below, there is no basis for granting the petition for certiorari.

I. Whether Title VII Prohibits Harassment Based on Sexual Orientation Is Not a Question Presented by this Appeal

Petitioner argues that the Court of Appeals' decision conflicts with other circuit opinions that have held that Title VII does not prohibit sexual orientation discrimination. Pet. at 17. The problem with Petitioner's argument is that there is no conflict. It has been the law in the Ninth Circuit for over two decades that sexual orientation discrimination is not prohibited by Title VII, *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), and the decision below did not hold to the contrary.[4]

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[4] In *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001), a Ninth Circuit panel rejected *DeSantis*' separate holding that Title VII's prohibition of sex discrimination does not extend to "discrimination based on a stereotype that a man 'should have a virile rather than an effeminate appearance.'" However, *DeSantis*' holding that employment discrimination based only on sexual orientation is not prohibited by Title VII has remained the law in the Ninth Circuit both before and after *Nichols*. *See, e.g.*, *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1537 (9th Cir. 1992); *Chambers v. City of Berkeley*, 2002 U.S. Dist.

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Indeed, far from concluding that sexual orientation discrimination is barred by Title VII, the plurality opinion of the en banc panel instead repeatedly and expressly "hold[s] that an employee's sexual orientation is *irrelevant* for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment." App. at 1a (emphasis added); *see also id.* at 1a-2a ("That the harasser is, or may be motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action"), 7a (sexual orientation of the victim is irrelevant regardless of his or her sex), 11a (sexual harassment is prohibited "without regard to the sexual orientation – real or perceived – of the victim"). Likewise, the opinion of the three judges who concurred in the result does not hold that sexual orientation discrimination is prohibited by Title VII, but rather that Respondent has an actionable claim for sexual harassment because of the existence of evidence that he was subjected to gender stereotyping. App. at 11a, 14a. See also App. 15a (separate concurrence of Circuit Judge Graber, expressly stating that "Title VII does not protect employees from discrimination because of sexual orientation," which she describes as an issue that the majority of the en banc panel "does not reach").

Petitioner in fact concedes that neither the opinion of the plurality nor the three-judge opinion concurring in the result actually asserts that Title VII prohibits harassment based on sexual orientation. Pet. at 10. Instead, Petitioner

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Lexis 4637, *12-*13 (N.D. Cal. 2002). None of the judges below questioned this. See App. at 28a (explaining that "this aspect of *DeSantis* remains good law").

argues that this is their effect. *Id.* As to both opinions, however, Petitioner is mistaken.

The plurality opinion does not in any way rely on Respondent's sexual orientation to reach its conclusion that, in this case, adequate evidence of harassment "because of . . . sex" was presented in order to preclude summary judgment. Rather, viewing the facts in the light most favorable to Rene – as is required in ruling on a motion for summary judgment – the plurality saw before it "a man who was repeatedly grabbed in the crotch and poked in the anus" (that is, who was subjected to severe and pervasive conduct of a sexual nature), "and who was singled out from his other male co-workers" (that is, was "treated differently" or discriminated against) "based on sex," and not on sexual orientation (or at least not on sexual orientation alone). App. at 10a. It is only by taking sentences of the plurality opinion out of context and ignoring the entirety of that opinion that Petitioner can argue otherwise. See Pet. at 6, 11, 12, 17, 18; see also App. at 15a (concurring opinion of Circuit Judge Fisher, concluding that "The repeated physical attacks targeted at body parts clearly linked to Rene's gender constituted overwhelming evidence from which a jury could infer that the attacks were based, at least in part, on Rene's sex.").[5]

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[5] Petitioner appears to argue that the plurality must have dispensed with any need to show that Rene was harassed because of his sex, based on how Rene answered deposition questions that asked him to speculate about why his harassers engaged in certain conduct. Pet. at 3, 6. Rene's responses that he thought the conduct was directed at him because he was gay, however, no more defeats his claim of harassment "because of . . . sex" than would the answer of a female employee that she thinks her supervisor fondled her because she has red hair and

(Continued on following page)

Likewise, the three-judge concurrence does not "in effect" hold that harassment based on sexual orientation is prohibited by Title VII. That opinion does not rely on the fact that Rene is gay to conclude that Rene's supervisor and co-workers harassed him by engaging in gender stereotyping. Rather, the opinion relies on evidence that these other men teased Rene about the way he walked, whistled at him "like a man does to a woman," repeatedly called him feminine names, and in a variety of other ways treated him "like a woman," App. at 12a, which all address qualities directly related to gender, not sexual orientation. Furthermore, the concurrence says nothing that would permit a Title VII claim by an employee repeatedly subjected to anti-gay attacks that are not based on gender stereotypes (such as pervasive vilification of gay people as

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he likes redheads. Admitting her supervisor's penchant for redheads would not defeat her Title VII case as being one that is only about non-actionable, hair color discrimination. Instead, a sexual harassment claim is available in both her case and Rene's because Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m); *see Spearman v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 14852 at *22, n.4 (N.D. Ill. 1999), *aff'd*, 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) ("Harassment can be motivated by many factors – sex as well as sexual orientation – and just because one discriminatory motivation as of yet is not recognized as impermissible under Title VII does not release the employer from liability for discrimination because of sex under Title VII."). As the plurality opinion below explained: "The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of ... sex.' Whatever else those attacks may, or may not, have been 'because of' has no legal consequence." App. at 7a.

mentally ill, dirty, depraved or diseased or as "sex fiends" or child-molesters).

Petitioner's assertion that it is "obvious" that, when an employee is harassed due to perceived non-conformity to gender stereotypes, this must be due to the harassers' perception that the employee is gay, and that therefore only non-actionable sexual orientation discrimination is occurring, Pet. at 20, encapsulates the error of the district court and original panel majority. Knowing that Rene is gay, these courts improperly ruled that the evidence in this case could *only* be interpreted as being about his sexual orientation and not his sex. See App. at 32a, 50a. As the Third Circuit has explained, this must be wrong. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) ("had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes.").

Thus, because no judge below decided that sexual orientation discrimination is prohibited by Title VII, that issue – as to which there is no conflict among the circuits – simply is not presented here.

II. Whether Title VII Harassment Cases Are Cognizable Without Proof That the Harassment Occurred "Because of . . . Sex" Also Is Not a Question Presented by this Appeal; Taken Together, the En Banc Opinions below Decided Only That Factual Issues Precluded Summary Judgment

The second question that Petitioner tenders also is not presented here. First, as explained above, neither the en banc plurality opinion nor the three-judge concurrence held that Title VII harassment cases are cognizable without proof that the harassment occurred "because . . . of sex." To the contrary, the plurality opinion found that there was enough evidence to entitle Rene to a trial on whether the harassment he suffered was "because of . . . sex" based on inferences that could be drawn from the grabbing of his male body parts and the discriminatory singling out of Respondent "in comparison to other men." App. at 7a, 10a. Likewise, the three judge concurrence found that harassment "because of . . . sex" could be established at trial based on the evidence Rene presented of gender stereotyping. App. at 12a, 14a.

Neither the plurality opinion nor the three-judge concurrence addresses the conclusions of the other. See App. at 11a (describing the two opinions as reaching "the same result but under a different rationale"). One judge joined both opinions, App. at 11a, and another joined the plurality and wrote a separate concurring opinion agreeing with a portion of the three-judge concurrence. App. at 15a-16a. With four opinions and a dissent, each with different reasoning, it is difficult to discern what, if any, precedent might be established by the decision other than that summary judgment should not have been granted

against Respondent. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [the majority], 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *see also Hale v. Arizona*, 967 F.2d 1356, 1365-66 (9th Cir. 1992) (applying *Marks* rule to fragmented court of appeal decisions), *reheard en banc*, 993 F.2d 1387 (without discussion of this point), *cert. denied*, 510 U.S. 946 (1993).

Indeed, contrary to Petitioner's assertions, neither the plurality opinion nor the three-judge concurrence makes sweeping pronouncements about the law calling for this Court's intervention. Both wrestle with jurisprudence that remains at early stages of development within the lower courts,[6] and simply permit further factual development rather than depriving Respondent – solely because he is gay – of the same opportunity any other Title VII plaintiff has to make a factual showing that he was harassed "because of . . . sex."

The limited precedential value of such a split decision is especially marked within the Ninth Circuit, and makes this case, and the issues identified by Petitioner, particularly unworthy of review by the Court at this juncture. *See*

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[6] See Section III hereof, below. *See also Bibby*, 260 F.3d at 262 (describing how to prove that harassment is "because of sex" as not an easy question to answer).

Lewis v. University of Pittsburgh, 725 F.2d 910, 930 n.10 (3rd Cir. 1984) ("en banc decisions in the Ninth Circuit are necessarily the product of a minority of that Court's members"). Here, because there is no majority opinion and it is difficult to determine the narrowest grounds that supported reversal of the trial court's grant of summary judgment against Respondent, the fractured en banc decision is unlikely to have much precedential effect even within the Ninth Circuit, and the issues the court considered may well be revisited and decided in a different and clearer fashion by another en banc panel of the Ninth Circuit at some later date.

It is important to recognize as well that this case itself is not yet over. It simply has been remanded for further proceedings and may be resolved in such a way that neither party would seek this Court's review. Alternatively, a decision based on the evidence adduced upon remand might present the issues more clearly for review by the Ninth Circuit and potentially by this Court at a later date. The only question before the Court at this point is whether the evidence in this case of near-daily, on-the-job sexual assaults, touchings, teasing, pranks, and references to Respondent by female terms over a two-year period was sufficient to permit a fact-finder to infer that Respondent was subjected to a hostile work environment because of his sex, and therefore whether Petitioner's motion for summary judgment should have been denied. While important

to these parties, this fact-bound issue is not one that demands this Court's time.[7]

III. There Is No Split in the Circuits on Whether Discrimination Because of Sex Can Be Shown Through Evidence of Sexual Stereotyping

Three judges of the en banc court below joined an opinion concluding that discrimination or harassment "because of . . . sex" can be shown based on evidence of gender stereotyping, App. at 11a-14a, and a fourth judge wrote separately to agree with this conclusion, App. at 16a.[8] In addition, the four dissenting judges agreed that "discrimination based on sex stereotyping" is a type of gender discrimination that is actionable under Title VII,[9] although they

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[7] As this Court explained in *Oncale*, such a determination is unusually fact-intensive, requiring not only that the harassing conduct be judged from the perspective of a reasonable person in the employee's position, considering "all the circumstances," (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)), but also that "careful consideration" be given to "the social context in which particular behavior occurs and is experienced by its target." 523 U.S. at 81.

[8] As noted above, the plurality opinion simply does not address the gender stereotyping issue.

[9] As the dissenters recognized, the Ninth Circuit already had held this to be the law in *Nichols*, 256 F.3d at 874-75. See App. at 31a. *See also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), in which the Ninth Circuit, in an even earlier decision, interpreted the Gender Motivated Violence Act, by analogy to Title VII, as encompassing discrimination against those "who do not conform to socially-prescribed gender expectations."

concluded that Respondent had not adequately asserted a claim based on that form of proof. App. at 20a, 30a.[10]

While several district courts in other circuits also have held that evidence of gender stereotyping may be used to prove that discrimination was based on sex,[11] no other court of appeal other than the Seventh Circuit [12] has issued a definitive ruling on this issue since this Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), let alone *rejected* the position that evidence of gender stereotyping can provide proof of discrimination based on sex.[13] Hence, there can be no split in the circuits on this

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[10] One judge who joined the majority opinion also wrote separately to express agreement with the dissent's view that Respondent had not adequately presented a claim arising out of gender stereotyping. App. at 15a.

[11] *See, e.g., Centola v. Potter*, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002); *Ianetta v. Putnam Invs., Inc.*, 142 F. Supp. 2d 131, 133-34 (D. Mass. 2001); *Jones v. Pac. Rail Services*, 2001 U.S. Dist. LEXIS 1549, *3-*6, 85 Fair Empl. Prac. Cases (BNA) 90, 79 Empl. Prac. Dec. (CCH) P40407 (N.D. Ill. 2001).

[12] *See Doe v. City of Belleville*, 119 F.3d 563, 580-83 (7th Cir. 1997), *vacated and remanded* "for further consideration in light of *Oncale* . . . ," 523 U.S. 1001 (1998), which *Bibby* concludes is still good law with respect to *Doe*'s holding (which is in accord with the three-judge concurrence in this case) that sex discrimination can be proven with "evidence that the victim's harassers sought to punish him for failing to live up to expected gender stereotypes." 260 F.3d at 263 n.5; *see also Hamm v. Weyauwega Milk Products, Inc.*, 199 F. Supp. 2d 878, 888-89, and 889 n.7 (E.D. Wis. 2002) (continuing to treat this aspect of *Doe* as valid Seventh Circuit authority).

[13] *See Bibby*, 260 F.3d at 262-64 (stating that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender," but finding that the appellant before the court had failed to allege or argue this); *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir.

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issue, because the Ninth Circuit and Seventh Circuits are the only courts of appeal to have reached an actual holding on the issue, and their decisions are consistent.[14]

Petitioner's argument that a "clear conflict exists" between courts that have declined to rule definitively on whether evidence of sexual stereotyping can establish the "because of . . . sex" element in Title VII cases (although indicating in dicta that they believe it can but that the issue was not adequately raised in the specific cases before them) and the Ninth Circuit's decision in this case (where

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2000) (stating that this Court in *Price Waterhouse v. Hopkins*, "implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex," but declining to reach this issue on the grounds that it had not been pled or presented adequately below); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085-86 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) (stating that "sex stereotyping may constitute evidence of sex discrimination," but concluding that employee in the case before it was not harassed on this basis); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259-60, 261 n.4 (1st Cir. 1999) (stating that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity," but concluding that appellant before it did not adequately raise or develop such a claim to the trial or appellate courts).

[14] Petitioner's attempt to conjure up a conflict by citing several cases that have allowed dress and grooming policies that impose different, but comparable, requirements on men and women, Pet. at 14 and 14 n.10, is unavailing, as the Ninth Circuit has not indicated that it disagrees with those cases. *See Nichols*, 256 F.3d at 875 n.7. That the distinction between being harassed based on stereotyped expectations of masculinity and femininity and being required to comply with appropriate dress and grooming codes may not yet have been clearly enough enunciated by the Ninth Circuit to satisfy Petitioner does not create a conflict that this Court needs to resolve.

four of the eleven judges of the en banc panel concluded that Petitioner adequately had presented such a claim, five disagreed, and the remaining two did not express a view on the subject), see Pet. at 21, is not the sort of substantial conflict that warrants a grant of certiorari.

Furthermore, Petitioner's assertion that this case conflicts with other cases that allow evidence of sexual stereotyping *only* about "on-the-job conduct" does not accurately distinguish this case in which, among other things, Rene was harassed about the way he walked at work, just like one of the employees allowed to sue in *Nichols*, 256 F.3d at 870, 874. Petitioner also mischaracterizes the dicta in the other, supportive circuit court cases, none of which drew any distinction between harassment based on sexual stereotyping regarding an employee's "on-the-job" versus "off-the-job" conduct. Even the *Price Waterhouse* plurality itself did not draw such a distinction, instead stating – in terms not qualified by the "on-the-job" limitation Petitioner invents – that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 490 U.S. at 250.[15]

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[15] Moreover, Petitioner's fabricated rule that employees should be protected against discrimination based only on a reaction to how they act *in the workplace* has no basis in Title VII law. For example, employees harassed because of the way they practice religion entirely outside of work are not denied recovery under Title VII. *See, e.g., Campos v. City of Blue Springs*, 289 F.3d 546, 551 (8th Cir. 2002). Similarly, to establish a claim for harassment because of national origin, an employee need not show that the abuse directed against him was due to on-the-job manifestations of his heritage. *See, e.g., Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995).

The ways in which employees can prove that they were subjected to discrimination or harassment "because of . . . sex" are still being developed by the lower courts. *See Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) ("the means of proving discrimination cannot be reduced to rigid formulae;" "What matters . . . is not whether the facts . . . alleged correspond exactly to any of the examples the Supreme Court has identified, but whether a reasonable factfinder could infer from those facts that [the employee] was harassed 'because of' his sex."); *Hamm*, 199 F. Supp. 2d at 890 ("the law governing same-sex sexual harassment is in its infancy and continues to evolve"). Particularly here, where the plurality opinion of the en banc panel did not even address the gender stereotyping theory, and where the case simply has been remanded for Respondent to prove that he was subjected to discrimination "because of . . . sex," there is no need for this Court to preempt the normal development of the case law in the lower courts or to preclude Respondent from attempting to prove his case.[16]

[16] In this way, this case is very similar to *Oncale*, in which this Court likewise remanded the employee's case for further proceedings to determine whether co-worker sexual assaults very similar to those also inflicted on Rene were indeed "because of . . . sex." 523 U.S. at 79-82.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-970

IN THE

Supreme Court of the United States

MGM GRAND HOTEL, LLC,

Petitioner,

v.

MEDINA RENE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page ii of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 3, 8

Respondent Rene misstates the *en banc* Ninth Circuit's opinions and retreats from the position he took in the district court and court of appeals. Rene now recites the prudential considerations that opponents of *certiorari* typically recite when they seek to discourage review. But the recitation does not make them so. In fact a ripe, important question of law is presented clearly for review.

I. RENE'S CURRENT POSITION DIFFERS FROM THAT WHICH HE TOOK BEFORE

Rene now contends that his theory of the case is that he was harassed "based on [him] being male." (Opp. at 1.) Yet he concedes elsewhere that he had contended all along that he was "singl[ed] out . . . '*in comparison to other men*'" — a theory that by definition is not *gender* discrimination. (Opp. at 11.) In the district court, Rene conceded that "The question raised by this [summary judgment] motion is whether the conduct alleged by Rene is prohibited by Title VII even though it was directed at Rene *because of his sexual orientation*." (Rene's Opposition to Summary Judgment at 3; emphasis added.) Later, in seeking *en banc* review in the Ninth Circuit, Rene argued, "[I]t is time for the Ninth Circuit to revisit its view of gay and lesbian rights. . . . Times have changed, society has changed, and hopefully the law has changed too . . . ." (Petition for Rehearing and Suggestion for Rehearing *En Banc* at 12.) The dissenting judges in the court of appeals unerringly quoted Rene's deposition testimony, which unambiguously alleged "sexual orientation" as Rene's theory of the case. (Pet. App. 33a-34a; *see* Pet. 32a n.8.) Rene's Opposition

thus departs markedly from how he articulated his position in the lower courts.[1]

Thus, Rene's contention that he is not presenting a sexual-orientation discrimination case is demonstrably wrong.

II. THE NINTH CIRCUIT *EN BANC* DEPARTED FROM *ONCALE* AND EXPLAINED HOW, THROUGH ARTFUL PLEADING, SEXUAL ORIENTATION CAN BE ENGRAFTED ONTO TITLE VII

The Ninth Circuit *en banc* revived Rene's claim by creating new law. The plurality held that Title VII automatically provides a remedy for offensive touching of the human body. (Pet. App. 5a-6a, 8a-9a.)[2] Most states provide a remedy (either statutory or in tort) for such conduct, but Title VII does not. This Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75,

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1. Rene's change of position will not be recognized. As this Court reiterated, where "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This rule "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (citation omitted). The rule serves the "integrity of the judicial process" by preventing parties from "playing fast and loose with the courts" based on the "exigencies of the moment." *Id.* (citations and internal quotation marks omitted).

2. Rene contends that a Title VII claim would not "exist in every case in which an employee suffers a physical assault directed at a sexually identifiable part of the body" (Opp. at 3), but neither he nor any of the court of appeals' opinions explains why that is so, let alone what the line of demarcation would be.

80 (1998), emphasized no Title VII remedy exists unless the conduct is "based on . . . sex." The term "sex" in Title VII means gender. *Id.* at 79. Deplorable conduct, without more, is not actionable. Except where substantial *gender*-based disparate treatment exists, Congress thus far has left it to the states to play the role of workplace-conduct monitor. The plurality here dispensed with the gender requirement that *Oncale* reiterated was essential under Title VII.[3]

The concurring opinion sweeps even more broadly. It significantly extended prior law in grounding its decision under the rubric of "stereotyping." Rene contends that no circuit conflict exists on this issue. (Opp. at 14.) It is true that no circuit has taken issue with this Court's general dictum in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), that sexual stereotyping in some circumstances can be a form of gender discrimination. In fact, however, the circuit cases after *Price Waterhouse* present the ultimate conflict, because (as shown in the petition) the cases: (i) reach diametrically opposite results, depending upon whether the reviewing court pigeonholes the case as one alleging "sexual orientation" discrimination (plaintiff loses) or "stereotyping" (plaintiff wins, or at least gets to trial); and (ii) provide no rule for deciding which pigeonhole a case belongs in. The facts of same-sex harassment

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3. Rene contends (Opp. at 8-9 n.5) that his deposition admission that the harassment was based on the fact that he was gay "no more defeats his claim . . . than would the answer of a female employee that she thinks her [male] supervisor fondled her because she had red hair and he likes redheads." Not so. The "redhead" example is a classic example of harassment based on gender. That a sexual harasser elects to demand sexual favors from a subset of the female population rather than all of it does not make the demand for sexual favors any less based on the female subordinate's gender.

cases are distressingly similar: the same touching, the same words. Yet some plaintiffs win, and some plaintiffs lose. The only difference is how the plaintiff's lawyer pleads the case.[4]

The proper role for the "stereotyping" doctrine is that stated in the petition. Where an employer penalizes employees or applicants of one gender for work-related behavior that is tolerated or praised in the other gender, then cognizable gender discrimination exists. For example:

- If a man is praised for being "aggressive," but a woman is derided as "pushy," gender discrimination exists.

- If a man uses profanity on the job with impunity, but a woman is punished for using the same words, gender discrimination exists.

- If a man who leaves work at 4 p.m. to coach Little League is praised for having "good family values," but a woman who leaves early to pick up the carpool is said to "lack commitment to her job," gender discrimination exists.

But it is a huge leap from examples like these to the unbounded holding of the Ninth Circuit's concurring judges. The concurring opinion charts a path in which substantially

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4. Or, as here, how deferential a court is willing to be in construing the pleading. Here, for example, the concurring judges were forced to assert that "gender stereotyping . . . is what Rene *meant*" to say when he was alleging sexual orientation discrimination. (Pet. App. 13a-14a n.2 (Pregerson, J., concurring; emphasis added).) Rene invites this Court's attention to his Complaint (Opp. at 2 n.3), and the Court should accept the invitation. Nothing in the Complaint even mentions the term "gender stereotyping" (or any other form of stereotyping).

every sexual orientation case can be repackaged to make it cognizable, notwithstanding Congress' choice to date that sexual orientation is not a status protected under Title VII. While Rene now purports to say that the *en banc* opinion did not decide very much (Opp. at 11, 13), in fact it was a *tour de force*. It explained how a plaintiff through artful pleading can circumvent the policy choice that Congress has made (and repeatedly reaffirmed, *see* Pet. at 10), in leaving to the states (in their fair employment practices statutes and common-law torts, such as battery) to provide a remedy for sexual orientation discrimination and harassment.

Rene contends that MGM Grand takes segments of the court of appeals' analysis out of context and ignores "the entirety of the opinion." (Opp. at 8.) But it is precisely "the entirety of the opinion" that calls for review. Because any sexual harassment claim can be repackaged as an allegation that the plaintiff did not conform to at least one gender stereotype (that of being sexually attracted to the opposite sex), the concurring judges have charted a path for recharacterizing every sexual orientation case to make it cognizable.[5] The plurality's opinion accomplishes the same thing, because virtually every same-sex sexual harassment case involves the same touchings, the same words, the same epithets. If this Court's teaching in *Oncale* means anything, it means that the courts must decide whether (rather than presume that) a claim is "based on" gender.[6]

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5. Rene's *amicus* (Bay Area Lawyers for Individual Freedom) explicitly argued in the Ninth Circuit (Brief at 2, 3, 6, 10) that "discrimination based on sexual orientation" by its nature is inherently "Discrimination 'because of . . . sex'."

6. Hence the flaw in Rene's contention (Opp. at 11-12, 13) that the case is unworthy of review because *en banc* court took

(Cont'd)

III. NO PRUDENTIAL CONSIDERATION IMPEDES REVIEW

Rene recites the prudential considerations that those opposing *certiorari* always recite: He contends that the case is factually oriented, and the facts are in dispute. In fact the opposite is true. Rene's factual contentions are assumed to be true in every respect. The critical undisputed facts are:

- Rene was openly gay. (Pet. App. 2a.)
- Rene was masculine and conformed to the male stereotype in every respect except sexual orientation. (Pet. App. 32a.)
- Rene experienced unwanted physical touching and stereotypical verbal comments mocking him despite his masculine appearance and demeanor. (Pet. App. 2a.)

There simply is no factual dispute to resolve.

IV. MGM GRAND IS NOT CONTENDING THAT GAYS AND LESBIANS CANNOT BRING SEXUAL HARASSMENT CASES

Rene's final approach is a transparent straw man. He alleges that MGM Grand's position is "that he should . . . be precluded from [suit] simply because he is gay."

(Cont'd)

different analytical paths to its result. The court was not at all fractured in its *result*: the path to pleading cognizable sexual-orientation cases now is clearly charted.

(Opp. at 4; *see also* Opp. at 2 n.3 ("his sexual orientation [should] not *defeat* his . . . claim"), 12 ("Respondent [should not be deprived] — solely because he is gay — of the same opportunity any other Title VII plaintiff has.").)

MGM Grand is not contending that gay plaintiffs cannot sue for sexual harassment. Of course they can — but under the rules established in *Oncale.* Rene's sexual orientation is neither protected nor disfavored under Title VII. Congress' choice to date has been to outlaw gender-based harassment, and Rene's case simply was not based on his gender (male), but rather because he was "singl[ed] out . . . '*in comparison to other men.*'" (Opp. at 11; emphasis added.) That is sexual orientation discrimination, not gender discrimination. While that surely "is a noxious practice, deserving of censure and opprobrium," *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999), Congress' choice thus far has been to leave it to the states to administer the censure and opprobrium.

Perhaps the day will come in which Congress makes a different choice. Until that day comes, the Ninth Circuit's *en banc* opinion effectively amends Title VII in the Ninth Circuit and creates a conflict which this Court should resolve.

CONCLUSION

Like cases should be decided alike. The Ninth Circuit's decision here treats as triable a sexual-orientation contention that other circuits would reject. The plurality ignored *Oncale*, and the concurring judges have extended the "stereotyping" rationale well beyond anything contemplated in the dictum in this Court's plurality opinion in *Price Waterhouse*. MGM Grand therefore respectfully suggests that the petition should be granted.

Respectfully submitted.

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